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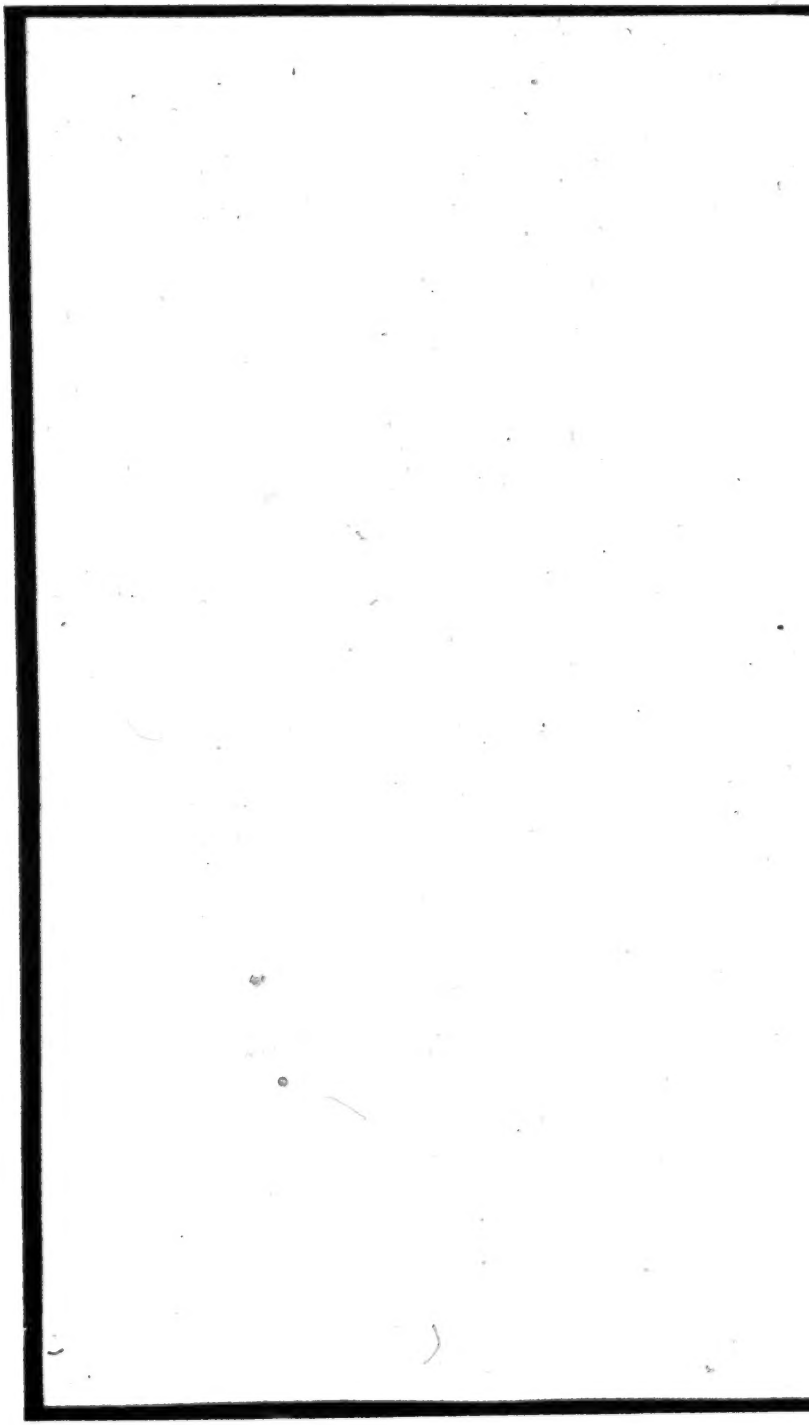
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TROOPER R. C. CALDWELL,

BEING RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Will you state your name please? A. R. C. Caldwell.

Q. You were sworn just a while ago to testify in this case, weren't you? A. Yes, sir.

[535] Q. Where do you live Mr. Caldwell? A. Fredericktown.

Q. Up here in Madison County? A. Yes, sir.

Q. You are with the Missouri State Highway Patrol? A. Yes, sir.

Q. I will ask you, how long have you been with the Patrol? A. Since the 14th day of December, 1942.

Q. Did you go to the Missouri State Penitentiary in September of 1954? A. Yes, sir.

Q. When did you get there sir? A. I got there at twenty-five minutes to eleven on September, the night of September 22nd.

Q. Do you know the Defendant, James William Stidham? A. Yes, sir.

Q. When was the first time you saw him? A. The first time I ever saw him was on the morning of the 27th of September.

Q. Where was that? A. In Death Row, at the Penitentiary.

Q. Now, did you go to Death Row? A. Yes, sir.

Q. Did you take the Defendant anyplace? A. Yes, sir, Patrolman Jenneman of the St. Louis Police Force [536] and myself, took him from Death Row to the field house of the Penitentiary.

Q. Did you go back to his cell to get him? A. I didn't go back to his cell, Patrolman Jenneman and a guard

after he had written the statement out, as to why he would get himself implicated in the murder of somebody that hadn't really done anything to him.

MR. HENNELLY: Object to that Your Honor, and ask that it be stricken and the Jury instructed to disregard it and a mistrial be declared, hearsay and not binding on this Defendant.

THE COURT: Overruled.

Q. Did he answer that statement? A. I asked him the words, I remember, as to whether—

THE COURT: Just state what his statement was.

A. He said that Donnell was a snitch and had snitched on some of the boys and that they had got a load of time out of it, and that I was living my life under a different code than he was living his, and that he respected my code, whether I did his or not.

Q. I believe that is all.

[540] *Recross-Examination by Mr. Hennelly*

Q. Did he say that he was living under a different code? A. Yes, sir.

Q. Did you, by that code, think that he meant that nobody should ever snitch on anybody else? A. I don't know what he meant, that is the words he said.

Q. But he did tell you that the reason Donnell was killed was because he had informed somebody and had snitched on somebody else, is that right? A. He told me that the reason he wanted to kill Donnell was that he was a snitch and that he had snitched on a bunch of the boys and that they had got a load of time out of it.

Q. There isn't any question about the fact that he said that to you, is there Trooper? A. If there was, I wouldn't make the statement.

Q. Nobody hit him and nobody did anything to him and nobody held him from the ceiling, that is true, isn't it? A. Yes, sir.

Q. Nobody did anything like that to him, isn't that right? A. That is right.

Q. Now, Trooper Caldwell, you took him from Death Row, is that correct? A. Yes, sir.

Q. And then you took him over to this shed? A. To the field house.

[541] Q. To the field house? A. Yes, sir.

Q. Did you take him back to Death Row when you were finished questioning him? A. No, sir.

Q. Was he in the same condition when you took him out of Death Row that he was when you left that shed, was he in the same physical condition? A. Yes, sir.

Q. He hadn't shown any evidence had he of any of his fingers being paralyzed as a result of being hung up? A. He didn't show anything like that.

Q. Didn't make any complaint to you about ever being mistreated, or anything like that, did he? A. No, sir.

Q. Nobody had to lay a hand on him, did they, nobody had to hang him up or do anything to him? A. There wasn't anybody that was hung up or beaten up, no, sir.

Q. Now, when you took him back after he had left there Trooper, where was it that you said you took him to? A. You mean from the field house, where we took him to?

Q. Yes, sir. A. After he made this statement?

Q. Yes, sir. [542] A. To O Hall.

Q. O Hall? A. Yes, sir.

Q. And did you place him in a cell there? A. I didn't place him in a cell. He was placed in a cell, but not by me.

Q. Had there been any conversation about the Defendant's wrist watch before he left Death Row? A. Not to my knowledge, no, sir.

Q. Did he have a wrist watch on? A. I don't remember seeing one on him.

Q. Well, did you assist in putting the handcuffs on him? A. He was brought out from his cell by Patrolman Jenneman and one of the guards out to the front and my handcuffs were placed on him, and his hands were handcuffed to the back of him like this.

Q. And did those handcuffs remain on the back of him during all of the oral interrogation? A. Yes, sir.

Q. And where was he in that room during that interrogation? A. Sitting in a chair.

Q. Did he at anytime leave that position at that chair? A. Not that I remember of.

Q. There was no, he made no movements after he once sat down to the best of your knowledge, is that right? A. As far as leaving the chair, I don't remember him leaving [543] the chair.

Q. Was he at a table when he was being interrogated? A. Close to a table similar to that, but he wasn't sitting right up close to it.

Q. No further questions.

MR. RILEY: That is all.

THE COURT: I believe we will recess now for supper. During the evening recess, remember the previous statements of the Court not to talk to anyone or permit anyone to talk to you about it, and don't discuss the case among yourselves or read anything about it or listen to anything about it, and the Sheriff will take you to the hotel for your supper and we will recess until seven or seven-fifteen.

And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 428) Tuesday, July 19th, 1955, Regular July 1955 Term

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Now at this time, it being supper hour, trial in this cause is recessed for the Supper Recess.

Now, supper recess being over, comes again the parties by their respective counsel, and comes the Jury herein impaneled and sworn to try this cause, and whereupon trial in this cause is resumed and progresses in the hearing of the evidence herein.

[544] THOMAS JENNEMAN,

RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Will you state your name please? A. Thomas Jenneman.

Q. Where are you employed sir? A. St. Louis Police Department.

Q. For how long have you been employed by the St. Louis Police Department? A. Fifteen years ago last December 24th.

Q. How old are you sir? A. Thirty-seven.

Q. I will ask you if you know the Defendant, James William Stidham? A. Yes, sir, I do.

Q. Can you recall when you saw him the first time? A. The morning of the 27th of September.

Q. What year? A. 1954.

Q. And where were you? A. At the Penitentiary.

Q. Where was the first time you saw him? A. In Death Row.

Q. You just tell us what you did and what happened. A. Trooper Caldwell and I, on orders of Lieutenant Eitzman went to Death Row to bring Stidham down to the baseball field [545] athletic shack for questioning concerning the murder of Walter Lee Donnell.

Q. And where did you go to get him? A. Death Row.

Q. Death Row? A. Yes.

Q. And you took him down to the recreation building on the athletic field? A. Yes, sir.

Q. Now, how was he taken down there? A. In the Patrol car, Trooper's car.

Q. And did you take him in the building? A. In the athletic building?

Q. Yes. A. Yes, sir.

Q. Were you there all the time he was there? A. Not all of the time, no, there was a couple of times that I stepped outside.

Q. Now, during the time—I will show you what has been marked as Exhibit 16 and 16-1, and ask you if you ever saw that before? A. Yes, sir. I have.

Q. Now, is your name, does your name appear on that exhibit? A. My initials on the first page and my name on the second.

Q. Were you there when that exhibit was written? A. Yes, sir, I was.

Q. All of it? A. Yes, sir.

[546] Q. Now, I will ask you if you or anyone in your presence who signed that, who wrote that Exhibit— A. Stidham wrote it.

Q. Did he sign it? A. Yes, sir.

Q. In your presence? A. Yes, sir.

Q. I will ask you if you or anyone in your presence promised Stidham anything to make a statement? A. No, sir.

Q. I will ask you if you or anyone in your presence threatened Stidham? A. No, sir.

Q. Threatened him in any way? A. No, sir.

Q. Strike him? A. No, sir. What did you say, trick him?

Q. No, strike him? A. No, sir.

Q. I said threaten? A. Threaten him, no, sir.

Q. Now, did you or anyone in your presence hit, strike, beat Stidham in any way, or in any manner? A. No, sir.

Q. Did you offer him any violence whatsoever? A. No, sir.

[547] Q. Now, did you tell Stidham what to put in that statement? A. No, sir.

Q. Who was doing the questioning? A. Lieutenant Eitzman and Sergeant Little.

Q. Did you hear them tell him what to put in that statement? A. No, sir.

Q. Did anyone tell him what to put in that statement? A. No, sir.

Q. Did Stidham make any statement other than what is contained in those sheets of paper? A. Made an oral statement before he wrote this.

Q. I will ask you if you can recall anything that he said orally, that isn't in that statement? A. I recall him saying that he had a grudge against Donnell, due to the fact that Donnell snitched on him in July while they were in E Hall.

And that was his reason for being put in Death Row, the snitch was over a riot that was supposed to take place in July.

MR. HENNELLY: I am going to object to that answer and ask that it be stricken and the Jury instructed to disregard it and a mistrial declared, as they are attempting to prove another crime, and it is an attempt to put the reputation of the Defendant in issue.

THE COURT: The objection is overruled.

[548] Q. That is all.

Recross-Examination by Mr. Hennelly

Q. Officer Jenneman, had you been up in the Penitentiary from the night that the riot began? A. Yes, sir.

Q. What time did you arrive up there? A. Early, about five-thirty the morning of the 23rd.

Q. Five-thirty the morning of the 23rd? A. That was Daylight Saving Time, four-thirty Jeff City time.

Q. Did you at that time go down into Death Row? A. No.

Q. Were you in B basement at anytime on the 23rd? A. No, sir.

Q. Now, you are attached to what district in St. Louis? A. Central.

Q. And Lieutenant Eitzman is your commanding officer, or at least one of your commanding officers down there, isn't he? A. Yes, sir.

Q. And these other officers, Billings and what is the name of the other officer that testified here? A. Overbeck.

Q. You are all out of the Central District? [549] A. Yes, sir.

Q. Incidentally, how big a man are you? A. Five foot eleven, one hundred and ninety-five pounds.

Q. One hundred and ninety-five? A. Yes, sir.

Q. Now, are you attached to any particular riot squad or anything in the City of St. Louis? A. No, sir.

Q. I see. Now then, when you came up to—strike that. On the day that this defendant was questioned, you were one of the officers that got him out of his cell in Death Row, am I correct in stating that? A. Yes, sir.

Q. Now, was there any conversation either directly to you, or any conversation in your presence with respect to a wrist watch that the Defendant had on? A. No, sir.

Q. There was none? A. No, sir.

Q. Did he have a wrist watch on when you first got back to his cell? A. When I first went to get him?

Q. Yes. A. I saw no wrist watch.

Q. Did you go to his cell? A. Went to the door of his cell.

[550] Q. And at the time that you went to the door of his cell, was he laying down on the floor or standing

up or where was he? A. Well, I don't recall whether he was laying down or standing up.

Q. And did you have some conversation with him then? A. I called him.

Q. Did you tell him you were going to take him over to the athletic shed? A. Didn't tell him where, said come along.

Q. Didn't tell him where he was going, is that right? A. No, sir.

Q. Did you stop at anytime in that classification room and raise him up off of the floor? A. No.

Q. Didn't do that, did you? A. No, sir.

Q. This time he was questioned over in the athletic shed, is that right? A. I don't know of any other time that he was questioned.

Q. All right. And can you tell me where these handcuffs were put on? A. You mean what part of his body?

Q. Yes. A. On his hands, and his hands were behind his back.

[551] Q. His hands were behind his back? A. Yes, sir.

Q. And then he was taken out of Death Row and put into one of the cars and taken some distance to this shack, is that right? A. He was taken out of his cell there shortly, or rather a small distance from his cell door is a cage, there is a walkway there, and he was brought up to the front gate of Death Row and there the handcuffs were put on him.

Q. There the handcuffs were put on him? A. Yes, sir.

Q. Now, when you took him in, did you take him in a car over to the athletic field? A. Yes, sir.

Q. Can you give His Honor and this Jury any idea of how far you had to drive to get him over there? A. From the Death Row cell?

Q. Yes, from the time you got into the car and you drove him over to the athletic shed? A. I would say perhaps close to a quarter or half a mile.

Q. Between a quarter and half a mile? A. Yes, sir.

Q. You know how close the Administration Building is to Death Row? A. No, sir.

[552] Q. You don't? A. No, sir.

Q. But you took him between a quarter and half a mile down there to question him, is that correct? A. Yes, sir.

Q. Now then, when he got down there and as he was sitting in the car, he was still handcuffed with his hands behind him, is that right? A. Yes, sir.

Q. Did either you or Trooper Caldwell have any shotguns with you or pistols when you went up there? A. I had a riot gun.

Q. You had a riot gun? A. And my sidearms.

Q. And your sidearms? A. Yes, sir.

Q. And with all that, you still handcuffed him to the back, is that right? A. Yes, sir.

Q. And then you taken him down there, and when he got in there, were there some officers in that room already? A. Yes, sir.

Q. And tell us if you will, where were they in that room? A. Seated at a table, and Lieutenant Eitzman was, I don't recall if he was seated at a table or standing behind it, and Sergeant Little was seated at the side of the table, and [553] I don't recall just where Overbeck or Billings were, but they were in the room, whether they were seated or standing I don't remember.

Q. Now then, do you, were you there for the first part or all of the questioning Officer? A. When we first went in it was a pretty hot day, and I stepped over to a fan that was there, and I was fairly close to the fan. Shortly afterwards I had to step outside, due to a severe cough that I had, and I was outside for a few minutes.

Q. You say that it was a pretty hot day, this was September, you say September 27th, is that right? A. Yes, sir.

Q. Was it, was the sun shining? A. Yes, sir.

Q. And would you say it was real hot? A. It was hot enough to where we were instructed by the Captain of the St. Louis Police Department to remove our blouses and go around in shirt sleeves.

Q. All right. Were you there while he was questioned at all in the beginning Officer? A. As I said, when we first went into the room with him, I stepped over to this fan, and shortly afterwards I stepped outside, due to a severe cough, which I had spent fourteen days in the hospital because of.

[554] Q. Did you come back in again? A. Yes, sir.

Q. And was he questioned then in your presence? A. Yes.

Q. And during that time Officer, did he deny that he had anything to do with the death of Donnell? A. I don't recall anytime that he denied it, when I was in there.

Q. You don't recall that? A. No, sir.

Q. You know how long you were gone outside of the room? A. Perhaps close to ten minutes.

Q. Close to ten minutes? A. Yes, sir.

Q. When you came back in, did you stand up close to the position where he was being interrogated by the officers? A. I stood to his left, rather, I went over and sat on a bench to his left against the wall.

Q. How far would you have been away from the Defendant at that time? A. Approximately four feet.

Q. Four feet? A. Yes, sir.

Q. But at no time did you hear him deny that he had anything to do with the murder? A. Not while I was in the room.

[555] Q. Not while you were there? A. No, sir.

Q. Now was he admitting then when you were there that he had something to do with the murder? A. Not right at that moment, no.

Q. All right. Now, is it your testimony that nobody hit him, nobody did anything to him, isn't that right? A. In my presence the man was never injured or struck in any way.

Q. And—

THE COURT: Let the witness answer, he was answering, go ahead and complete your answer. What were you saying?

A. In my presence the man was never touched and never injured and never threatened in any way.

Q. All right. Was he at anytime taken and lifted up to the ceiling, rather lifted a few inches from the ground with a rope which was attached to the handcuffs to the back? A. No, sir.

Q. That wasn't done was it? A. No, sir.

Q. Did you leave that room at anytime after that first time that you went outside? A. No, sir.

Q. And did he complain of any pain in his hands? A. No, sir.

[556] Q. Could you see his hands? A. See both of them.

Q. And there was nothing wrong with the hands when you saw them, is that right? A. Not that I could see, no, sir.

Q. You didn't see any shrinking of the little finger and the next finger on the left hand, did you? A. I did not observe anything like that.

Q. All right. Now then, how long was he in there before he made a signed statement? A. I would say approximately twenty-five minutes or a little longer.

Q. Twenty-five minutes? A. Yes, sir.

Q. Now, was he still in the same position when the statement was reduced to writing as he had been in when he was making the oral statement? A. No, when he started writing, the handcuffs were removed.

Q. And did he remain in the same chair and in the same position? A. Same chair, but not the same position, no.

Q. All right. Now, at that time, were you all seated around the table? A. Not all of us, no.

Q. Did anybody tell him anything to put in that statement? [557] A. No, sir.

Q. Nothing at all, is that right? A. He was instructed to state what his name was and his age.

Q. His name and his age? A. And that he was an inmate of the Penitentiary.

Q. You were there, you were right there, weren't you? A. Yes, sir.

Q. And he was instructed to give his name and his age and that he was an inmate of the Penitentiary? A. Yes, sir.

Q. Now, is that the only thing that anybody said to him that was at that table during this interrogation, is that the only thing that anyone said to him? A. Is that the only thing anyone said to him?

Q. Yes, is that the only directions given to him with regard to writing the statement? A. Yes.

Q. The only thing? A. Yes.

Q. No question about that now, is there Officer? A. I don't recall anything else that was said.

Q. Now, how long would you say it took him to write the thing out? A. I would say possibly around fifteen or twenty minutes.

[558] Q. Fifteen or twenty minutes? A. Yes, sir.

Q. Now, after he got finished, did you put the handcuffs on him again? A. I don't believe we put them on immediately, no.

Q. Did you put them on him after you got him outside? A. We put them on to take him back to O Hall, where we took him.

Q. You didn't take him back to where you got him, did you? A. No.

Q. Were there at the time you went to Death Row and got him, were there some other men celled in Death Row? A. Yes.

Q. When you took him back down to O Hall, who was with you at that time? A. Trooper Caldwell.

Q. Sir? A. Trooper Caldwell.

Q. Trooper Caldwell? A. Yes, sir.

Q. Was that the last time that you saw the Defendant Stidham? A. No.

Q. Did you question him at any time after that? A. No, I didn't question him.

Q. I am sorry. Did you hear anybody else question him after that? [559] A. No, sir.

Q. Did you see him down in the hospital down in Springfield, Missouri? A. No, sir.

Q. You—did you go down there Officer? A. No, sir.

Q. No further questions Your Honor.

MR. RILEY: I believe that is all. Call Officer Billings.

CHARLES BILLINGS,

BEING RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Will you state your name please? A. Charles Billings.

Q. You have been previously sworn, haven't you? A. Yes, sir.

Q. And how old are you Mr. Billings? A. Thirty-five.

Q. By whom are you employed? A. St. Louis Metropolitan Police Department.

Q. How long have you been Officer? A. Eleven years.

Q. Are you acquainted with the Defendant, James William Stidham? A. Yes.

Q. I will show you what has been marked as State's Exhibit 16 [560] and 16-1. Have you seen that instrument before? A. Yes, sir.

Q. Do you know what it is? A. Yes, sir.

Q. Did you sign it? A. Yes, sir.

Q. Did you sign both pages? A. I initialed the one page and signed the other.

Q. And were you present when that instrument was written? A. Yes, sir.

Q. Who wrote it? A. James Stidham.

Q. And did he sign it? A. Yes, sir.

Q. Were you present when he signed it? A. Yes, sir.

Q. Where did this occur? A. In the field house at the Penitentiary.

Q. Were you there when Stidham was brought in? A. Yes, sir.

Q. Were you there all the time? A. Yes, sir.

Q. Were you there when he left? A. Yes, sir.

Q. And I will ask you if at anytime you or anyone else made [561] any promises to Stidham to get him to sign this statement or make it? A. No, sir.

Q. I will ask you if you or anyone else in your presence threatened Stidham in order to get him to make this statement? A. No, sir.

Q. I will ask you if you or anyone else hit, beat, struck Stidham with anything, hands, fists, clubs or anything? A. No, sir.

Q. Did you offer him any violence whatsoever? A. No.

Q. Did he write this statement out in his own handwriting? A. Yes, sir.

Q. And did you or anyone there tell him what to put in it? A. No, sir.

Q. Prior to making this statement, did you hear Stidham make an oral statement? A. Yes, sir.

Q. And I will ask you if you can recall anything that Stidham said regarding Walter Lee Donnell, and confine it to Donnell, if he made any statement regarding Walter Lee Donnell, that isn't in that written statement. A. He said in his oral statement that Donnell had snitched on him several months prior, and when they attempted another riot, and that is why he was in Death Row.

[562] MR. HENNELLY: Same objection, if Your Honor please.

THE COURT: Same ruling.

MR. RILEY: That is all.

Recross-Examination by Mr. Hennelly

Q. Officer, you are also out of the Central District, downtown district in St. Louis, aren't you? A. Yes, sir.

Q. And there is of course a Police Department rule against beating any prisoner, isn't there? A. Yes, sir.

Q. And there is also, to your knowledge, there is also a Federal Statute against beating any prisoner, isn't there? A. Yes, sir.

Q. All right. Now then, so let me ask you, none of you, there was no beating done in your presence or no beating done by you, was there? A. No, sir.

Q. Now then, I am going to ask you Officer, at the time that Stidham first got there into that cellar, I am sorry, into that shed, it was a shed, wasn't it? A. It was a field house. It wasn't what I call a shed, no.

Q. How many rooms in that place? A. Oh, the only room we were in was one big room.

[563] Q. All right. And can you give His Honor and the Jury the dimensions of that room? A. Oh, about twenty by thirty, thirty-five feet.

Q. And when he first came in there, were you all standing or sitting around the table, or what were you all doing? A. Standing and sitting.

Q. I see. And he was manacled at that time, was he? A. Yes, sir.

Q. And did he have a coat on? A. No, sir.

Q. Was he at anytime in your presence placed in a chair, and a coat put around him? A. No, sir.

Q. Did anybody hit him with any sticks? A. No, sir.

Q. You have to answer sir, so the gentleman can get it. A. I said no, sir.

Q. Were there any sticks in that building which could be used for cork ball games, did you see any of those around there? A. There were bats in the place.

Q. Bats? A. There was the sporting, sports office.

Q. Did anybody take any of those bats, or any of that sporting equipment and make use, fool around with it in front [564] of Stidham? A. No, sir.

Q. Didn't do that? A. No.

Q. When Stidham was first questioned, did he deny having anything at all to do with the death of Walter Lee Donnell? A. When he was first questioned.

Q. How long did he persist in that position Officer? A. Oh, about twenty to twenty-five minutes.

Q. Now, I am going to ask you if at that time he was taken and hung up with his hands in back of him and suspended six or eight inches from the ground, with his feet six or eight inches off of the ground? A. No.

Q. That is not true? A. No, sir.

Q. All right. But in any event, nobody did anything to him, did they? A. No, sir.

Q. But he then admitted that he had something to do with it, is that right? A. Yes, sir.

Q. That is when he made an oral statement? A. Yes, sir.

Q. Did anybody have to do anything at all to him in a physical way? [565] A. Not in a physical way, no, sir.

Q. Now then, I will ask you Officer, how long did the oral interrogation take? A. Oh, another twenty-five minutes to half an hour.

Q. Twenty-five minutes to half an hour? A. Yes, sir, or less maybe. I mean, I wouldn't say for sure, but I would say it was twenty or twenty-five minutes.

Q. Let me ask you this, have you St. Louis Officers discussed this thing between yourselves at anytime? A. We have discussed the case.

Q. All right. I will ask you this, did anybody tell the Defendant what to write into that statement? A. No, sir.

Q. Nobody told him anything? A. No, sir.

Q. No further questions.

MR. RILEY: I believe that is all.

MR. RILEY: At this time the State offers State's Exhibit 16 and 16-1.

MR. HENNELLY: The Defendant will object and except to the introduction of State's Exhibit 16 and 16-1 for the reason that it is hearsay, for the reason that it was taken in violation of the Constitutional Rights of this Defendant, under both the State Constitution and the Federal Constitution and for the reason that at the time it was taken this Defendant [566] had been in custody, both actual and technical custody, being an inmate of the Missouri State Penitentiary, and being manacled and being handcuffed, and for the reason that a proper foundation has not been laid for its introduction and to introduce it under these circumstances and with the evidence so far adduced, would be a violation of all of the Constitutional Rights of this Defendant.

THE COURT: The objection is overruled. Now then, I suggest that the statement be read to the Jury.

MR. RILEY: Can I read it?

THE COURT: I was going to add further, that it then be shown to the Jury, but that it be read. I don't see much point in letting each member of the Jury have to read it through its entirety. I think if it is read to the Jury at this time, and then passed to the Jury, that will be sufficient.

(Out of the hearing of the Jury)

MR. RILEY: At this time, before I read the Exhibit to the Jury, I will ask counsel for the Defendant if he wants to interpose an objection to that part of the statement which refers to the sentence, which sentence he is now serving, and the fact that he has two prior convictions.

THE COURT: Three previous convictions is the way it is written here.

MR. HENNELLY: I am objecting to the entire Exhibit Your Honor, but I am certainly objecting to that section. I think that it [567] is putting his character and reputation of the Defendant in issue prior to the time that he

takes the stand, but I am objecting to the whole statement, and I had included that in it Your Honor.

THE COURT: Well, in view then of the objection of that particular part as far as the introduction of Exhibit 16 and 16-1, the objection as to the Exhibit being received in evidence, is overruled, but as to that particular part, I think, following the word "Penitentiary" in the fourth line, the Court will strike out for the reading and exhibiting to the Jury, the following words, "serving a sentence of twenty-five years for armed robbery", and then that looks like a comma, "I have three previous convictions of and then it looks like either a semi-colon or a comma, there is some other punctuation after that now, I think that would be the part that should not be read to the Jury. Now in passing that to the Jury, I think possibly a piece of paper could be cut and with scotch tape could be pasted over that.

MR. RILEY: I believe it would be better to use a piece of paper. The scotch tape could be taken off and the statement wouldn't be destroyed as it now is.

THE COURT: If you paste a piece of paper on it, it would be, the possibility would be that you would never be able to remove it.

MR. REX HENSON: I will take care of it Judge.

[568] THE COURT: I want to complete this record, the statement, that is the part of the statement that is affected by this ruling of the Court now reads, "My name is James William Stidham. I am Twenty-five years of age. I am from Kansas City, Missouri, I am at the present time an inmate of the Missouri State Penitentiary serving a sentence of twenty-five years for armed robbery. I have three previous convictions of Dyer Act at the time of the riot in the Missouri State Penitentiary on September 22nd, 1954. I was confined in Cell 23 of Death Row at 6:50 P.M."

MR. HENNELLY: That is the part you are taking out, aren't you Judge?

THE COURT: And then it continues on, but I am taking out that part, the wording, "serving a sentence of twenty-five year for armed robbery. I have three previous convictions of Dyer Act." That is where the end of that is.

MR. HENNELLY: You are not going to cut it out of the statement are you?

THE COURT: No, he is going to put a piece of paper over it and put that on there with scotch tape because you can see through the scotch tape, to read any of the rest of it. I think I will state to the Jury that certain parts of it are taken out. I don't want to tell them any reason why it is out or any of that kind of comment.

MR. HENNELLY: May the record show now that the Exhibit 16 and [569] 16-1, being in its present form, with the sections deleted which the Court stated it was ordering deleted, that Defendant still objects to its introduction for the reasons which I have heretofore stated, that it is hearsay, that it was taken in violation of the Constitutional Rights under both the Federal and State Constitutions, and that no proper foundation has been laid for its introduction in its present form.

THE COURT: You are not objecting to the fact we deleted some of it, that don't contain the full statement, because you objected, that is the reason I sustained that part of the objection.

MR. HENNELLY: I don't think I can in good confidence do such a thing.

THE COURT: The objection to the introduction as deleted is noted and overruled. Gentlemen of the Jury, the attorney for the State will now read to you Exhibit 16 and 16-1, and I want to mention to the Jury the fact that there is some scotch tape on this Exhibit and a portion of it has been ruled out by the Court and that accounts for

the scotch tape that is on it. It will be, after it has been read, it will be passed to you for your inspection, but that part has not been received in evidence, and only such part as you can see, and as the Prosecuting Attorney can now read, are received in evidence for your consideration. [570] By saying this, the Court isn't and doesn't intend to give to the Exhibit any undue inference or to intimate what the Court thinks of it. It is evidence in the case and is received in evidence and is now for your consideration as it now stands.

Exhibit 16 and 16-1, having been received in evidence read in words and figures as follows:

James William Stidham September 27, 1954

My name is James William Stidham I am Twenty-five years of age, I am from Kansas City, Missouri. I am at the present time an inmate of the Missouri State Penitentiary. At the time of the riot in the Missouri State Penitentiary on September 22, 1954, I was confined in Cell 23 in Death Row. At 6:50 P.M. on the above date I heard very loud noises, pounding, hollering, etc., and as a result thereof several rioting prisoners broke in Death Row, and Paul Kenton unlocked my door whereupon I came out of the cell, then myself and several other prisoners went to Crayton's cell with the purpose of attacking him but he had his door lock blocked and we could not enter. After we left Crayton's cell I saw that Donald's cell had been open, and someone said lets get Donald, so we went in. Besides myself in Donald's cell, I know that Paul Kenton, Laster, Thompson, Linder, were also in the cell. I heard an exchange of words between two guys referring to each other as Thompson and Linder. Kenton held Donald while Laster [571] stabbed him several times with a ice pick, at the same time I slashed at him three or four times around the face and neck with a knife that Kenton gave me when he opened

the door, when Donald fell to the floor Linder and Thompson each said get Donald with the sledge and they proceeded to hit him with a sledge hammer and crow bar; During this time someone was holding a flashlight that Kenton previously had. When we left the cell Donald was lying on his back with his head pointed toward the door. The knife I had was a regular kitchen knife about six or seven inches in length, when I got back upstairs in B Hall, I threw the knife on the floor near the west end on the south side of the building.

P.R.L. W.E. T.J. C.B. R.C.C. E. O.

Exhibit 16
LWE
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James William Stidham

Page 2

For the remainder of the night I just roamed around the cell block until the riot ended.

/s/ James William Stidham
September 27, 1954
12:35 P.M.

Witnesses:

/s/ Lt. Walter Eitzman
/s/ P. R. Little, Mo. S.H.P.
/s/ Ptn. Elmer Overbeck
/s/ Ptn. Charles Billings
/s/ Pat'n. Thomas Jenneman
/s/ R. C. Caldwell

[572] Exhibit 16-1
LWE
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THE COURT: Now Gentlemen, the Exhibit which has just been read to you, which has been received in evi-

dence, may now be passed among yourselves, and any Juror that wishes to read it in its entirety may do so. I had the Prosecuting Attorney read it so that it might save some time. If you just want to look at it and examine it, or make any inspection that you wish, why you may do so.

MR. HENNELLY: May the record show that I am now asking the Court to strike all of that from the record which counsel read, the reading of the statement, and instruct the Jury to disregard it, and declare a mistrial.

THE COURT: Overruled.

MR. RILEY: State rests.

MR. HENNELLY: At the close of the State's case, the Defendant moves the Court to instruct the Jury to return a judgment of acquittal, especially to murder in the first degree, for the reason that under the evidence in the case, the State has failed to show that the burden of the proof, especially with respect to murder in the first degree.

THE COURT: Are you just dictating that into the record?

MR. HENNELLY: I am Judge, and I am going to make another one Your Honor, a general motion for a judgment of acquittal. [573] Comes now the Defendant at the close of the State's case, and moves the Court to instruct the Jury to return a judgment of acquittal.

THE COURT: All right, the motion for reduction of the crime from first degree is overruled, and the motion for acquittal is overruled, at the close of the State's Case. The record may note that the Defendant objects and excepts to the ruling of the Court.

And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 428) Tuesday, July 19th 1955, Regular July 1955 Term

Now at this time, comes the defendant herein, by counsel and offers Motion for Acquittal of Murder in the First Degree at the close of State's Case, which is refused and overruled. Defendant objects and excepts, and continues to object and except to the ruling of the court.

And thereafter, to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 428) Tuesday, July 19th, 1955, Regular July 1955 Term

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Now comes the defendant herein, by counsel and offers [574] Motion for Acquittal which is refused and overruled by the Court. Defendant objects and excepts to the ruling of the Court, and continues to object and except.

MR. HENNELLY: Let me put on the guy from the Bureau of Vital Statistics with the Death Certificate, and I intend to put on the woman from the hospital secondly. At the time she gets ready to go on, if you have got some objection to it, I will make an offer of proof, and let me get rid of her. I take the position that it is admissible, and that it is a Jury question, notwithstanding the fact that I submitted it to the Court at first in order for the Court to determine, and whatever the Court says, of course, will be done

THE COURT: Call whoever you wish to and I will rule on them as I come to them.

CLYDE BRIDGER,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Hennelly

Q. What is your name, please? A. Clyde A. Bridger.

Q. How do you spell your last name, sir? A. B-r-i-d-g-e-r.

Q. Sir, what is your occupation, or profession? A. State Registrar of Vital Statistics.

[575] Q. And how long have you been in that position, sir? A. Six years.

Q. And what are your duties in that position? A. To file the original records, birth records, stillbirths or death, permanent records.

Q. Have you a subpoena duces tecum which His Honor issued to produce in His Honor's Court the official records with respect to the Death Certificate of one Walter Lee Donnell? A. I have.

Q. Is it with you now at this time? A. It is.

Q. Mark it Exhibit F.

Reporter marked Exhibit F, a Death Certificate.

Q. Let me ask you this, when were you served with a subpoena in this case? A. On the morning of July 14th.

Q. On the morning of July 14th? A. Yes, sir, that is correct.

Q. I will hand you now what has been marked for the purpose of identification as Defendant's Exhibit F, and I will ask you what that is? A. That is a standard Certificate of Death of the original Death Certificate.

Q. Of who? A. Walter Lee Donnell.

Q. Are you the keeper of those records, sir? [576] A. Yes, I am the keeper of that record.

Q. And it is kept in the normal course of business and under your custody and control, is that correct? A. Yes, sir.

Q. At this time the Defendant will offer into evidence if Your Honor please, Defendant's Exhibit F.

MR. RILEY: No objection.

THE COURT: Is that, let me ask the witness, is that an original record, is that the only one that is on file?

A. That is the only original record on file, a duplicate is kept by a local officer under my jurisdiction.

THE COURT: What I was wondering, if there was something that could be agreed upon, as a photostat that could be substituted for the original.

MR. RILEY: Isn't this a photostat? A. This is the original.

MR. HENNELLY: He can send a photostat down.

A. I can supply a photostat Your Honor, I can supply a photostat in any quantity that you need.

THE COURT: Could we keep this until tomorrow? A. No.

THE COURT: There is a man here who can photostat it. I thought you had it there.

MR. HENNELLY: This has been changed Your Honor.

A. No, this is the one before it was changed.

[577] THE COURT: Here is a photostatic copy with your certificate on it.

A. Yes, sir, that is correct. Let me look at it one minute and see if everything I have got here is clearly—

THE COURT: Do you want to compare it?

MR. HENNELLY: Yes, I would like to.

THE COURT: Can it, inasmuch as the witness has identified the photostat, can it be agreed that same be marked Exhibit FF, and used for the purposes of the exhibits of the original in this case?

MR. RILEY: Yes.

THE COURT: Inasmuch as Exhibit F is a part of the permanent files of the State of Missouri.

Reporter marked Exhibit FF, photostat of Exhibit F.

Reporter marked Exhibit G, Death Certificate.

Q. Now, I want you to refer, if you will sir, to State's Exhibit FF, which may the record reflect FF, as well as F has been accepted in evidence?

THE COURT: He is looking at both of them and we are going to use Exhibit FF, for the purpose of introduction in this case.

MR. HENNELLY: Now, referring to State's Exhibit FF, can you tell me when that was originally filed?

A. Yes, sir, originally filed in my office on September 27th, 1954.

[578] Q. Now, was that Exhibit later amended? A. Yes, sir, it was.

Q. And when was it amended? A. On July 15, 1955.

Q. Would you, could you identify the record as it existed, a photostatic copy of the record as it existed prior to the time that it was amended? A. Yes, sir, I can.

Q. I will hand you what has been marked for the purpose of identification, as Defendant's Exhibit G, and I will ask you whether or not that is the—or was the official record prior to the time that it was amended? A. This is a certified photostatic copy of the original record before it was amended.

Q. Was that record kept in the normal course of business? A. Yes, sir, the original was.

Q. And under your custody and control? A. Yes, sir.

Q. You will certify that was the original record at the time you were served with a subpoena duces tecum on September 14th? A. Yes, sir.

Q. I will offer this first in evidence, Your Honor.

MR. RILEY: I don't have any objection.

THE COURT: All right, this may be received in evidence, that [579] is Exhibit FF, and Exhibit G.

Exhibit FF, having been received in evidence, and the Reporter not being furnished a photostatic copy of same at the time of the preparation of this transcript, for that reason same is not copied into this record.

Exhibit G, having been received in evidence, reads in words and figures as follows:

THE DIVISION OF HEALTH OF MISSOURI
STANDARD CERTIFICATE OF DEATH

FILED SEP 27 1954 State File No. 30116

Reg. Dist. No. 77 Primary Reg. Dist. No. 3016
Registrar's No. 251

1. Place of Death
   a. County—Cole
   b. City—Jefferson City
   c. Length of stay (in this place) 3 yrs.
   d. Full name of Hospital or Institution—State Penitentiary
2. Usual Residence
   a. State—Tennessee
   b. County—Unknown
   c. City or Town—Brentwood
   d. Street Address—RR#1
3. Name of Deceased—Walter Lee Donnell
4. Date of Death—September 22, 1954
5. Sex—Male

6. Color or race—white

7. Married.

8. Date of birth—February 20, 1924

9. Age— 30 7mo. 2days.

10. Usual occupation—truck driver

10b. Kind of business—unknown

[580] 11. Birthplace—unknown

12. Citizen of what country—U.S.

13a. Father's name—unknown

13b. Mother's maiden name—unknown

14. Name of husband or wife—(wife) Margaret L. Donnell

15. Was deceased ever in U. S. Armed Forces? Unknown

16. Social Security No.—Unknown

17. Informant name—State Penitentiary Hospital Records

18. Cause of Death

1. Disease or condition directly leading to Death—By bullet wounds of gun in unknown hands

19b. Major findings of operation - - - E981x

22. I hereby certify that I attended the deceased from ..... 19....., to ....., 19....., that I last saw the deceased alive on ....., 19....., and that death occurred at ? P.M. from the causes and on the date stated above.

23a. Signature—/s/ Ben S. Markway, Sheriff Cole County

23b. Address—Box 426 Jefferson City, Mo.

23c. Date signed—9-23-54

24a. Burial, Cremation, Removal—Removal

24. Date—September 24, 1954

24c. Name of cemetery or crematory—National Cemetery

24d. Location—Nashville, Tenn.

Date Rec'd by Local Reg.—Sept. 23-1954.

Registrar's Signature—/s/ R. P. Dorris M.D. N.R.

25. Funeral Director's Signature—/s/ Sylvester Dulle J.D., Mo.

THIS IS A CERTIFIED COPY OF AN ORIGINAL DOCUMENT

[581] State of Missouri)
) ss.
City of Jefferson)

I HEREBY CERTIFY that the above is an exact photostatic reproduction of the certificate for the person named therein as it now appears in the permanent records of the Department of Public Health & Welfare of Missouri. Witness my hand as State Registrar of Vital Statistics and the Seal of the Division of Health of said Department this date of July 11, 1955.

/s/ Clyde A. Bridger,
State Registrar of Vital Statistics

(Seal)

Exhibit G,
LWE
7/19/55

Q. Now, I want you to refer to State's Exhibit, Defendant's Exhibit G, and under cause of death, will you

read please what was the cause of death? A. By bullet wound of gun in unknown hands.

Q. And that is the official record of the Death Certificate of Walter Lee Donnell? A. At that time, yes.

Q. Now then, if you will please, would you look at FF and tell us what the amended record shows? A. The amended record now shows, injuries multiple, extreme stab wounds in heart and lung, brain, trauma and crushing injury [582] of skull, autopsy, yes. Item 28 reads homicide. Item 21 reads, September 22nd, 1954. Item 21, by parties unknown.

Q. By parties unknown? A. Yes, sir.

Q. And I will ask you whether or not you didn't—strike that. Do you know who it was that caused the amendment of that record? A. Only by nature of a telephone call.

Q. And did you recognize the voice? A. No. I presumed that I knew.

Q. Well, I don't think it would be admissible. I think it would be hearsay. I have no further questions at this time.

Cross-Examination by Mr. Riley

Q. Mr. Pritchard— A. My name is Bridger.

Q. Pardon me. Why was the, do you have any information there attached to that exhibit showing why the Death Certificate was changed or amended? A. You mean the type of evidence that was presented?

Q. Yes. A. It was presented in the form of an affidavit.

Q. And whose affidavit was that? A. Ben S. Markway, Sheriff of Cole County, Missouri.

[583] Q. Now, who signed the original certificate? A. Ben S. Markway, Sheriff of Cole County.

Q. And does your office permit Death Certificates to be corrected? A. Yes, sir, it does.

Q. And only if the party making the Death Certificate submits an affidavit? A. That has been the custom before I ever came there and I have followed it since.

Q. Anybody who makes an original certificate and then submits an affidavit under oath, why you permit those certificates to be corrected? A. That is correct.

Q. And you make the corrections in your office? A. Yes, sir.

Q. And this certificate here was corrected? A. That is correct.

Q. The first certificate shows that, doesn't show that an autopsy was performed, does it? A. May I refer to Exhibit G?

Q. Yes, Exhibit G. A. No.

Q. The second certificate as corrected, shows that an autopsy was performed? A. FF does show such.

[584] Q. That is all.

Redirect Examination by Mr. Hennelly

Q. You testified last week in the Kenton case, didn't you? A. I did not.

Q. Was the record seen in the Kenton case, to your knowledge? A. No.

Q. It was not? A. Not the original record.

Q. Was the photostatic copy sent? A. Yes, I am pretty sure it was.

Q. The photostatic copy was sent? A. I think so.

Q. And after that time, the record was changed, isn't that correct? A. That is my understanding. Let me put it that way.

Q. No further questions.

MR. RILEY: That is all.

THE COURT: These have been received in evidence. Do you wish to show them to the Jury?

MR. HENNELLY: May they be passed to the Jury?

THE COURT: Yes.

MR. HENNELLY: I have no further questions.

MR. RILEY: That is all.

THE COURT: (Out of the hearing of the Jury) The record can show that we have been discussing here for a moment the [585] matter of the reception or the introduction into evidence of the record of State Hospital No. 1, which has been previously testified to by the witness, Mrs. Alma Miller. The file folder was marked as Exhibit B, as an exhibit for the Defendant, and another portion thereof was marked Exhibit C, and Exhibit C-1, being two pages of the same report, and which is entitled, Re: James Creighton, C-r-e-i-g-h-t-o-n No. W4266, April 14, 1954, and starts out, Social Data, and Exhibit B, a part of said file entitled, Confidential: For Professional Use Only. This Exhibit, together with Exhibits 14 and 15, letters from said file have previously been identified by the aforesaid witness as part of the record of the file of James Creighton, in the Missouri State Hospital No. 1 at Fulton, Missouri. And the Court has suggested and intimated his feeling that these records are subject to objection and should not be received in evidence, and is suggesting to counsel that inasmuch as they have already been identified, all that would be necessary at this time would be merely the offering of these Exhibits into evidence by counsel. That the only purpose of calling Mrs. Miller to the stand would be to identify, and just merely reiterate what she has already testified to. Now, I think the record should further show that if counsel for the Defendant accepts this method of offering that he has not and is not waiving any of his right relative to the offering of this Exhibit, by [586] not reputting this

witness on the stand, and certainly I don't want to preclude you from calling her to the stand and making an effort to identify them, but it seems to me like it would be just a waste of time to further identify what she has already identified. If you will just make your offer and then the State can make their objection, and then the Court can rule upon those objections.

MR. HENNELLY: Defendant offers into evidence, and I might say that the Court has already accepted into evidence only for the purpose of passing upon the original—

THE COURT: The question of the competence of the witness Creighton to testify.

MR. HENNELLY: That is right, and the Court indicated to counsel that if counsel wanted to submit them at a later time, that counsel would have to re-submit them.

THE COURT: Re-offer them.

MR. HENNELLY: Re-offer them. If I want to read them to the Jury.

THE COURT: And I believe that photostatic copies of these may be sent down by this witness to take the place of those exhibits in the record, in the event that the record is transcribed.

MR. HENNELLY: Yes, under those circumstances, the Defendant will offer into evidence, Defendant's Exhibits C and C-1, and Exhibit D, Defendant's Exhibit D.

[587] MR. RILEY: At this time the State objects to the introduction of Exhibits C and C-1, for the reason that the witness who has identified this has stated that she does not know who prepared this Exhibit, or in what manner it was prepared, and for the further reason that it is hearsay and for the further reason that it doesn't prove or disprove any issues in this case, and for the further reason that it contains opinions and conclusions

of unknown parties. That is all. State objects to the introduction of Exhibit D, Defendant's Exhibit D, for the same reason.

THE COURT: All right, the objection will be sustained.

MR. HENNELLY: Very well, Your Honor.

MR. RILEY: In order that the record will be complete on behalf of the State, I offer Exhibits 14 and 15.

THE COURT: They are already in evidence, as far as the transcript of the record is concerned, and need not be recopied. They are not before the Jury. And so they will be available for the Court upon appeal if the matter is appealed, to look at and determine. You can exclude them from the transcript Mr. Ehlers, since they are already a part of the record, and photostatic copies can be supplied.

MR. RILEY: I expect you are making the same ruling on my offer as you made on his?

THE COURT: I am not going to receive them. Well, maybe I ought to let you make an objection, if you want to make one.

[588] MR. HENNELLY: Excuse me, I am put in a ridiculous position.

THE COURT: Let me say this, with the evidence, without an objection, the record may show that the Court will not permit Exhibits 14 and 15 to be read to the Jury, but they are in the record as far as the transcript is concerned, so they may be considered in connection with all of these questions in passing upon its admissibility into evidence by the Court on Appeal.

THE COURT: Gentlemen of the Jury, as I mentioned to you, I don't know if it was this morning or yesterday evening, in a trial of this type, there are various matters that have to be considered by the Court out of the hearing and in the presence of the Jury, relative to

admissibility or inadmissibility of evidence and testimony in the case. You have to be very patient and have had to be on two occasions today at least when matters had to be taken up, and first you were excluded from the Jury Room, and then just this evening when we had some matters to take up which we could take up here outside of your hearing, without having to send you out of the Court Room. I have also during this little lull in the proceedings, as far as the Jury is concerned, but we were passing upon a legal matter here, and I have inquired of counsel as to the further witnesses that will be used, and the possibility of using further witnesses and I have determined from what information that has been [589] given me, that it would be impossible for us to complete all of the testimony in this case tonight. And in other words, to go to the final conclusion of the case. You see after all the testimony has been received, you still have to have the instructions of the Court and the argument of counsel, and so it would be impossible and it would be wrong from a physical standpoint for everybody concerned, to try to continue on with this case this evening. So we are going to recess again for the evening, and I feel confident that this case will probably be concluded sometime tomorrow morning or shortly afternoon tomorrow. During the recess again tonight, you are instructed not to become separated from each other or permit anybody to talk to you about it, or discuss it with you. You will be in the custody of the Sheriff for the evening, and arrangements have been continued for your rooms down at the hotel, and any needs that you have, you can contact the Sheriff relative to those and he will see if they can be met for you. So with that, the Court will be in recess until tomorrow morning at nine o'clock, and all witnesses that are here are ordered back at that time.

And thereafter, to-wit: On the same day, the following order was entered of record:

[590] Circuit Court Record, Butler County, Missouri (Book 62, page 428) Tuesday, July 19th, 1955, Regular July 1955 Term

Now at this time, trial in this cause is recessed for the Evening Recess and the Jury is placed, by the Court, in the custody of the Sheriff of Butler County, Missouri, and it is ordered by the Court that this cause be laid over to July 20th, 1955.

And thereafter, to-wit: On the 20th day of July, 1955, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 429) Wednesday, July 20th, 1955, Regular July 1955 Term

Now on this day, again comes the parties herein, the Prosecuting Attorney of Cole County for the State, and the defendant herein, in person and by counsel, Mark Murray Hennelly, and also comes again the jury herein impaneled and sworn to try this cause. Whereupon, the trial is resumed in this cause, after night recess, and progresses in the hearing of the evidence to the conclusion thereof.

JAMES WILLIAM STIDHAM,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Hennelley

Q. What is your name, please? [591] A. James William Stidham.

Q. Mr. Stidham, when were you born? A. February 2nd, 1926.

Q. Have you got a birth certificate with you? A. Yes, I do have.

Q. Mark this Defendant's Exhibit H.

Reporter marked Exhibit H, birth certificate of James William Stidham.

Q. We offer this in evidence, if Your Honor please.

THE COURT: All right, there being no objection, it may be received in evidence.

Exhibit H, having been received in evidence, reads in words and figures as follows:

JEFFERSON COUNTY BOARD OF HEALTH
BUREAU OF RECORDS AND VITAL STATISTICS
Birmingham, Alabama

CERTIFIED COPY OF BIRTH RECORD

Full name of Child—James William Stidham—File No. 879 Bm

Color or Race—White Sex—Male Date of Birth—Feb. 2, 1926

Place of Birth—8509 Walker Ave., Birmingham, Alabama.

Usual Residence of Mother—Same

Father of Child—William Sylvester Stidham

Birthplace—Texas

Mother of Child—Opal Hughes Birthplace—Mississippi
Physician or Midwife in Attendance—J. C. Smith, M. D.
[592]Date Certificate Filed—February 1926

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

I hereby certify that the above is a true and correct abstract of information contained in the original birth certificate as filed and permanently recorded in the Bureau of Vital Statistics, Jefferson County Board of Health, Birmingham, Alabama, and is issued under the provisions

of Section 42, Title 22, State Code of Alabama, 1940, as amended.

/s/ Geo. A. Denison, M. D.
Health Officer.
By: /s/ Geo. V. Fruss,
(Seal) Registrar of Vital Statistics.

Date of Issue—January 18, 1955.

Exhibit H
LWE
7/20/55

Q. So that Mr. Stidham, how old were you then on the night of September 22nd, 1954? A. I was twenty-eight years old.

Q. Twenty-eight? A. Yes, sir.

Q. Now then, I am going to ask you, refer you, if you will, to State's Exhibit 1, which is the plat to your rear, and indicate to the Court and Jury where you were celling at that time? [593] A. At that time, I was in the cell next door to the shower.

Q. What was the number of your cell? A. I don't know the number of the cell.

Q. I see. You were next to the shower though? A. Yes.

Q. Which direction were you from Creighton? A. I was west from there.

Q. Now, can you indicate where Creighton was? A. I was never at his cell. I only know he was in an eastward direction from me.

Q. Now, point which way you mean, eastward? A. That direction.

Q. Down at that end? A. Yes, sir.

Q. Now then, I am going to ask you, did you at anytime—strike that. On the night of September 22nd, 1954,

did anything, did you hear any unusual noises or hear anything unusual? A. Yes, sir, I did.

Q. Approximately what time did that begin? A. I would say around six-thirty.

Q. Now, I am going to ask you Mr. Stidham, at any time after six-thirty, did you tell Mr. Donnell that if you got out, you were going to kill him? A. No, sir, I did not.

[594] Q. Did Mr. Donnell say anything, did you hear him say anything after six-thirty on that night? A. Yes, sir, I did.

Q. What did he say? A. He was talking up and down the walk saying that he was afraid of some guys in St. Louis who were intending to kill him.

MR. RILEY: Ask that that be stricken out, purely hearsay, what Donnell said.

THE COURT: This is the Defendant and Donnell is the party alleged to be deceased, the objection will be overruled.

Q. Now then, I will ask you, did you tell Mr. Creighton that you were going to kill him that night? A. No, sir, I didn't.

Q. Did you at anytime while you were in Death Row, tell Creighton you were going to kill him? A. No, sir, I didn't.

Q. Did Mr. Creighton, can you tell His Honor and this jury what Mr. Creighton said, anything he said to you during those times? A. Yes, sir, on numerous occasions.

Q. What did he do? A. He threatened to kill me and threatened to kill practically everybody in Death Row at different times.

MR. RILEY: Now, if the Court please, we object to what he [595] said to everybody else. I don't mind what he said to this man.

THE COURT: The way in which that answer came, and the scope of it, I think the last part of the answer may be stricken at this time. Now the witness may testify what Creighton told him, because Creighton has testified.

Q. Well, did you hear Mr. Creighton say anything in such a tone of voice that you could hear him from the time you were in Death Row up to the night of September 22nd? A. Yes, sir, I did, several times he said that he would kill two others—two other guys while he was in the Penitentiary and he intended to kill me at the same time.

MR. RILEY: This is not what he said to this Defendant Your Honor.

A. Yes, sir, he said that to me.

THE COURT: No he testified that is what he heard Creighton say at this time, 6:30. Go ahead

Q. All right, I am going to ask you on the night in question, which is September 22nd, 1954, at the time that you heard these unusual noises, did anybody by the name of DeLapp holler back to you, and holler, "Slick, we are coming in to get you out"? A. There was so much noise throughout the prison that I cannot say, because I don't know his voice, in fact I only knew him on sight.

[596] Q. Let me ask you this, did you have any conversation, you directly, from your cell, to anybody who was up in front knocking on any of those doors? A. No, sir, it was impossible on account of the noise.

Q. Now then, I am going to ask you sir, did you get out of your cell that night? A. Yes, sir, I did.

Q. Tell us what time approximately you got out of your cell? A. I would say around eight o'clock.

Q. And do you know who let you out of your cell? A. I don't know, but some colored fellow, I think his name was Ford.

Q. And what did you do when you got out of your cell? A. I went upstairs.

Q. Who did you go upstairs with? A. Don Lyons and Bill Crabtree.

Q. Now, when you say you went upstairs, did you leave this section in B basement? A. Yes, sir, I went directly upstairs from here, which would be B Hall.

Q. All right. And did you, were you joined by anybody else at anytime? A. Yes, sir.

Q. And by whom were you joined? [597] A. Red.

Q. And what is his name, what is his name, if you know? A. I don't know his first name.

Q. And where did you spend the rest of that night? A. It was in a cell that belonged to Don Lyons and Crabtree.

Q. And what were you doing in there? A. Listening to the radio and drinking coffee.

Q. I am going to ask you Mr. Stidham, did you make any, did you go into Mr. Donnell's cell on the night in question? A. No, sir, I did not.

Q. Did you kill Mr. Donnell, or did you slash him or cut him with a knife or anything on the night in question? A. No, sir, I am a thief, but I am not a murderer.

Q. Now then, let me ask you this, were you questioned by the police after that time? A. Yes, sir, I was.

Q. How many times after that were you questioned? A. The first time was shortly after midnight on September 24th.

Q. Who questioned you then? A. Members of the State Highway Patrol.

Q. Where? A. At the classification room at the Penitentiary.

Q. I am going to show you what has been accepted by His Honor, as evidence in this Court, as State's Ex-

hibit 11, and [598] ask you if that is the classification room? A. That appears to be.

Q. Is that where you were questioned? A. Yes, sir.

Q. Now, did this questioning, did they question you concerning the death of Walter Lee Donnell? A. Yes, sir.

Q. What did you tell them at that time? A. They asked me if I knew Donnell and that is the Trooper asked me that, and I told them that only on sight, and they asked me if I knew who killed him, and I told them no, and they asked if I participated in it, and I told them no. They made several threats to me trying to make me say that I did know who killed him, and I didn't know, and I couldn't say, and they also questioned me about different parts of the riot, which I didn't know anything about and couldn't have known anything about.

Q. Now then, how long did you stay in the classification room on that occasion? A. Probably an hour and a half.

Q. Now, when they got through questioning you in the classification room at this time, where did they take you? A. Near the end of that interrogation, I offered to take a lie detector test, and truth serum and show them that I was completely innocent of this crime, and that ended the [599] interrogation, and I was taken to my regular cell.

Q. You went back to your regular cell? A. Yes.

Q. Nobody struck you or did anything to you at that time? A. No, sir.

Q. So you were taken back to your regular cell? A. Yes, sir.

Q. Now, were you questioned at anytime after that Mr. Stidham? A. Yes, sir, I was.

Q. How many times after that were you questioned? A. The next time I was taken out of my cell, I believe it was on the 26th.

Q. And where were you questioned then? A. In the same room.

Q. Who questioned you there? A. Members of the Patrol.

Q. And for how long were you questioned? A. It was around an hour.

Q. And you continued to deny that you had anything to do with the murder? A. Yes, sir, I did.

Q. Now then, I will ask you, were you questioned at any other time Mr. Stidham? A. Yes, sir, I was.

[600] Q. Tell His Honor how many other times you were questioned by either the State Highway Patrol or by members of the St. Louis Police Department? A. They used to stop in front of my cell during the rounds and ask questions concerning the murder of Donnell, and each time I would deny it.

MR. RILEY: I wish that the witness would speak up.

A. Each time I advised them that I didn't know anything about the crime.

Q. Now then, were you on September 27th, were you questioned? A. Yes, sir, I was.

Q. And I will ask you Mr. Stidham, where did you, where were you celling on September 27th? A. I was in Death Row.

Q. Still in your same old cell? A. Still in the same cell.

Q. And I am going to ask you sir, who came and got you? A. There was a State Trooper and a St. Louis Policeman.

Q. Now, what happened when they came to your cell for you? A. They came to my cell around ten o'clock in the morning and said let's go, and I stepped to the door,

and one of the Policemen told me to pull off the watch, or they probably would break it, or mess it up some way, so I taken my watch off and gave it to the trusty. Then my hands were cuffed behind me and I was taken in front of B and C Hall, and placed [601] in a Patrol car and driven down to what is known as the athletic shed, or field house.

Q. Now then, were you questioned in the athletic shack sir? A. Yes, sir, I was.

Q. Tell us what happened as soon as you got in there. A. As soon as I went in there, there was a stool chair sitting on the floor, and I was placed in this chair and as soon as I was placed in there, some officer got in front of me and put handcuffs on my ankles and put a belt around my ankles, and something that locked, like a GI Belt, and at the same time they were taking the cuffs off of my hands and putting a heavy coat on me, and then cuffed them, handcuffed them, and a belt on my arms behind me.

Q. Did they rehandcuff your arms behind you? A. Yes, sir.

Q. Now, what happened then, sir? A. Lieutenant Eitzman, I didn't know his name at that time, but I learned his name, he asked me to tell everything that I knew about the riot and what happened on Death Row the night of the riot. I told him that I didn't participate in the riot and I didn't know what happened on Death Row the night of the riot.

Q. Did he ask you if you had anything to do with the death of Walter Lee Donnell? [602] A. Yes, sir, he did.

Q. What did you tell him? A. I told him I absolutely didn't.

Q. All right. And for how long did you continue to deny it sir? A. Well, I told the officers that I had been interrogated several times prior to that time, and that each time I had told them I didn't know anything about the murder or about the riot, and I told Lieutenant Eitzman

I was willing to take a lie detector test and truth serum test to show that I was completely innocent of the crime that he was asking me about, and at that time, Lieutenant Eitzman said, give him the lie detector test, and they had a rope on my handcuffs and they elevated me off of the floor and suspended me in the air.

Q. Now, at that time, approximately how many inches off of the ground were your feet? A. I would say between six inches and a foot.

Q. All right. Now, how long did you remain in that position? A. Around fifteen minutes the first time.

Q. Did they continue to question you while you were in that position? A. Yes, sir, they did. They didn't question me, they accused me.

[603] Q. All right. Did you at that time tell them that you had anything to do with the death of Walter Lee Donnell? A. I told them I was completely innocent of it, and didn't know anything about the riot.

Q. Did they cut you down? A. Yes, sir, after about fifteen minutes.

Q. Then what happened? A. I was taken over to a table and they talked to me and asked me to write a statement that they would dictate concerning the murder.

Q. How many times were you hanging there sir, did they put you back up again the second time? A. Yes, when I refused to sign the statement.

Q. Then how long did you hang there on the second occasion? A. It was quite sometime. I lost consciousness twice while I was hanging there on the second occasion, and near the end though, I heard one of the officers say that I had been up there thirty-five minutes, and during this time I knew that my hand and left arm had become paralyzed and numb.

Q. Now, did they do anything else to you besides that sir? A. Yes, sir, they did while I was hanging there, they took something like a stick, a ballbat, and I was beaten in front and beat on the body with that.

[604] Q. Now, after you had been up there thirty-five minutes sir, did you, were you taken down the second time? A. Yes, I was.

Q. What happened then? A. I was in real great pain, and I could no longer resist the torture.

Q. So what happened? A. And I agreed to write whatever they would dictate.

Q. All right. Now, I am going to show you what has been introduced into evidence as State's Exhibits 16 and 16-1, and ask you if that is the statement that you wrote? A. It appears to be, yes, sir.

Q. And this is your signature on it, isn't it? A. Yes, sir, it is.

Q. All right. Now then, this statement starts out, My name is James William Stidham, and I am twenty-five years of age. Now, as a matter of fact, how old were you that night sir? A. I was twenty-eight years old.

Q. Now, who told you to put down twenty-five years of age? A. The policemen.

Q. And do you know which one of the officers was dictating to you? A. Sergeant Little of the Highway Patrol.

Q. All right. Now, with respect to this section of the [605] statement that Paul Kenton, Laster, Thompson, Linder were also in the cell, now did you see any of those men around there sir? A. I wasn't around the cell myself, so I couldn't have seen any of them.

Q. What about, did you, did somebody tell you to write down two guys referring to each other as Thompson and Linder? A. Yes, sir, the St. Louis Policemen said write those guys down, because they knew they was im-

plicated in the crime, and those guys, Donnell testified against both guys.

Q. You know which St. Louis Police Officer told you that? A. No, sir, I don't, because I do not know who they were, but I do know that it was a St. Louis Police Officer. I believe it was Overbeck.

Q. I see. Now then, I am going to ask you Mr. Stidham, after you got finished signing that statement, I am going to ask you if you told any of those Police Officers there that the reason you killed Donnell, was because he had snitched on some friends of yours? A. No, sir.

Q. Well, had he snitched on any friends of yours? A. Not that I know of. I didn't know the guy except when I seen him in Death Row.

Q. All right. And did you tell him that you wanted to kill Creighton and that you would kill Creighton again? [606] A. No, sir, I didn't.

Q. All right. A. I told them that Creighton was always acting like a raving maniac on Death Row, and would sometimes go berserk and out of his head and rage for hours at a time, threatening to kill me and other guys around there, and that he had been in an argument and he said he had killed two other guys and I will kill you too.

Q. Now then, when you got finished signing this statement, what did they do with you? A. Well, they instructed me that under no circumstances was I to ever reveal the torture and the hanging that I went through in the field house, because it would cause an F.B.I. investigation, and might cause them some trouble if I did, and that they would have a chance to get me later, or get to me later or something, and they said, made some kind of a comment about showing us hoosiers something, a policeman made a comment.

Q. I will ask you this sir, were you taken back to your cell on this occasion? A. No, sir, I wasn't.

Q. Where did they take you to this time? A. What is known as O Hall.

Q. And what was the, can you give us some description of that cell sir? A. Yes, it was just a bare floor, a small cell with nothing [607] in it.

Q. And how long did you remain in that cell? A. I went in that cell on Monday and was taken out Wednesday morning I believe.

Q. Did anybody visit you? A. No, sir. Somebody attempted to visit me.

Q. Who attempted to visit you? A. The Priest at the prison.

Q. The Chaplain up at the Prison? A. Yes, sir.

Q. Did they permit him to visit you? A. No, sir.

MR. RILEY: Just a minute, wait until I object. I object to this unless this witness knows of his own knowledge or saw that they did not permit him to visit him.

THE COURT: Yes, that can be answered, you can answer that if you saw or actually know.

A. I know of my own knowledge.

MR. RILEY: You mean you know from an opinion that you have?

A. No, sir, I know of it of my own knowledge.

THE COURT: He may testify what he knows of his own knowledge.

Q. Tell us the circumstances under which you know that of your own knowledge, that the Chaplain tried to visit you. A. The Chaplain came to the door and shook the door and said [608] he wanted in, and there was several officers outside of the cell in the hallway, and they got in a huddle near my door, and said that is the Priest and these guys are beaten up too bad to let the Priest in to see them, and they refused to let him in.

Q. Now then, let me ask you this sir, did you leave the Penitentiary at anytime after that? A. Yes, I did. I left on September 29th, Wednesday morning.

Q. Where did you go? A. I went to the Cole County Court House.

Q. Let me ask you this, did you, were you taken at any time to a hospital? A. Yes, sir, I was taken to the U. S. Medical Center at Springfield, Missouri.

Q. And did you talk to some doctors down there? A. Yes, sir, I talked to at least two of them.

Q. Did you tell them what had happened to you? A. Yes, sir, I told the doctors that I had been hanging up by my arms and at that time my left hand and arm was stiff, paralyzed, and my fingers drawn up in that shape where I couldn't straighten them out, and I didn't have any strength in my left hand, and I told the doctors that.

Q. No further questions.

Cross-Examination by Mr. Riley

Q. Stidham, you say that you were twenty-eight years old in [609] September of 1954? A. Yes, sir.

Q. I will ask you if on September 29th or September 30th, 1954, if you didn't tell the authorities at the Springfield Federal Penitentiary that you were thirty-four years old? A. No, sir, I didn't. I said my age wasn't asked at Springfield.

Q. If their records say that you were thirty-four years of age on that date, are they wrong?

MR. HENNELLY: Object to that, that is argumentative.

A. They didn't ask my age.

THE COURT: Sustained.

Q. How long were you in O Hall? A. From Monday until Wednesday.

Q. I will ask you if you didn't testify—what time Monday? A. Around noon.

Q. Until what time Wednesday? A. In the morning.

Q. What time in the morning? A. About eight or eight-thirty.

Q. I will ask you if yesterday, on preliminary hearing on this matter, if you didn't testify that you were put in O Hall for three days? A. I said it covered a period of three days, that is Monday, Tuesday and Wednesday.

[610] Q. Well, actually you were there six hours less than two days, weren't you? A. Well, if you count it up, yes, I probably was.

Q. Now, when you were questioned in the classification room, how many officers, the first time, how many officers were there? A. I didn't count them, but I would say there was around fifteen.

Q. Now, who were they? A. Well, some of them I still don't know their names. Some of them I do know their names now.

Q. Who do you recall? A. Lieutenant Barton, State Highway Patrolman, Sergeant Olin Curtis.

Q. Who is Sergeant Olin Curtis? A. Of the Highway Patrol.

Q. Where is he from? A. Kansas City.

Q. He is from Kansas City? A. Yes.

Q. Do you know him? A. Upon sight, yes.

Q. Do you know Sergeant Olin Curtis? A. Yes, sir, I do.

Q. And you are sure that Olin Curtis was there in the classification room on September 24th? [611] A. Yes, I am because he told those State Highway Patrolmen there at that time that he didn't think it would do any good to—

Q. I can't hear you. A. He told those State Highway Patrolmen there at that time that he had arrested me in Kansas City before and interrogated me there.

Q. You are sure that it was Sergeant Olin Curtis from Kansas City, and you know him personally? A. I know him upon sight.

Q. Well, I say, I want you to be sure. What time was that? A. That was about three A.M. in the morning.

Q. Three A.M. in the morning of what day? A. September 24th.

Q. Well, didn't you just testify just now that it was after midnight on the 24th? A. Three A.M., I think that is after midnight.

Q. No, that would be after midnight on the 23rd. A. Well, it was after the 23rd, then.

Q. When you said the 24th, it actually wasn't the 24th, it was the 23rd, wasn't it? A. It was after midnight on the 23rd, yes.

Q. All right. Now, who did the questioning? A. Lieutenant Barton. He did the majority of it.

Q. Now, I will ask you if yesterday here, you didn't say that [612] Olin Curtis did most of it?

MR. HENNELLY: Excuse me, I am going to object, if Your Honor please, to the use of any of the material that was put before the Court in the motion to exclude certain elements, for the reason that by the very nature of that testimony, that was testimony for the Court only, for the purposes of the Court determining whether or not the statement was voluntary, and that it may not subsequently be used for the purposes of impeachment.

MR. RILEY: It is prior inconsistent statements Your Honor.

THE COURT: I think any prior inconsistent statement upon oath is admissible for the purpose of impeachment. I wouldn't permit the State to merely refer to it for the purposes of bringing out some things that may not be pertinent before this Jury, but certainly if there is, or should appear to be any inconsistency between the statement pre-

viously made under oath, whether in the presence of this Jury or not, I think they would be admissible for the purpose of impeachment.

MR. HENNELLY: Very well.

THE COURT: The objection will be overruled.

MR. RILEY: I will repeat my question. I will ask you if yesterday, the testimony here before the Court, if you didn't say that Olin Curtis did most of the questioning?

A. I believe I said Mr. Riley that he participated in it.

[613] Q. Didn't you use the words, most of it? A. He did participate in that, in that interrogation.

Q. Now, who else was there? A. Lieutenant Barton of the State Highway Patrol, Sergeant Nash, Sergeant Little of the Highway Patrol, and Trooper Caldwell and Inman and Barkley.

Q. Who else? A. Some of them I learned the names later.

Q. Who were they? A. Lieutenant Barton, Nash, and Inman, Barkley, Caldwell, and Little, and Curtis and there were several others there.

Q. That is seven, you say there were fifteen? A. Yes, sir.

Q. Now, you say you learned the— A. Yesterday I believe I said I learned eight of them.

Q. Who were the, name the eight that you learned their names later on. A. Barkley, Nash, Inman.

Q. No, I mean of the eight that you haven't mentioned? A. Well, there is one more that I don't recall right at the moment.

Q. What is that? A. There is one more that I named yesterday.

Q. Who is that one more? A. I don't know that now.

[614] Q. You don't know any of these other eight? A. Well, I believe that I named eight of them yesterday.

Q. Barton, Caldwell, Barkley, Inman, Nash, Little and Curtis, seven as I count them. A. Yes, sir.

Q. How big is this classification room? A. I couldn't estimate it.

Q. Well, could you show the jury what space in this room would equal the area of that classification room? A. I would say that it is as large as the Jury box.

Q. About the size of the Jury box? A. Yes, sir.

Q. And was there a table in there? A. There was, but it wasn't in the position at this time.

Q. Where was it? A. It was more or less in the center of the floor.

Q. Well, how many chairs were in there? A. I don't know, some of the officers were sitting and some standing.

Q. How many were sitting and how many were standing? A. I don't know.

Q. Now, you say that this room is about the size of this Jury box? A. I never did have any reason to look it over real good Mr. Riley, but I would say at this time that it is about that [615] size.

Q. You have been in that room a number of times, haven't you? A. Yes, sir.

Q. I mean you have been in there times other than when the Patrol took you there, haven't you? A. I have.

Q. And you tell this Jury that there were fifteen officers in there, as well as this table? A. Yes, sir. In fact I seen eighteen ball players in that room.

Q. That would be sixteen, and that room is about as big as this Jury box? A. I would say it is about that size.

Q. Now, with twleve men sitting in that Jury box, could you find room to put that table?

MR. HENNELLY: Certainly object to that, that would be argumentative.

Q. Stidham, you have been convicted of a crime? A. Yes, sir, I have.

Q. Tell this Jury when and where? A. I was convicted April 2nd, 1943, at Memphis, Tennessee.

Q. On April 2nd, 1943, at Memphis, Tennessee, for stealing an automobile, and where else? First, what sentence did you receive? [616] A. I received three years in the Reformatory.

Q. Where else, and what other crimes have you been convicted of? What Court was that Stidham? A. In Federal Court.

Q. All right. Then convicted of any other crimes? A. I don't have any other convictions against me other than this present one, and the one I just mentioned.

Q. What crime are you convicted of, serving now? A. Robbery.

Q. What sentence do you have? A. Twenty-five years.

Q. What County was that from? A. Jasper County.

Q. When was that? A. I received the sentence on May 28, 1952.

Q. Was that robbery in the first degree with a dangerous and deadly weapon? A. It was robbery, yes, sir.

Q. Now, how many times were you questioned in your cell? A. The State Troopers and the St. Louis Police, they were patroling in front of the cell maybe every hour or every two hours, and on several occasions they would stop in front of my cell.

Q. Now, who were those troopers? A. They was just members of the State Highway Patrol and [617] St. Louis Police.

Q. How many times were you questioned? A. I would say four or five days time, a day probably, total number up to twenty-five times in five to eight days.

Q. Now, how long did they question you? A. They would stop and ask me questions about the crime, and I would tell them I didn't know anything about it, and I certainly knew I wasn't involved in it.

Q. There were other inmates present at the time weren't there? A. No, sir, there wasn't.

Q. You mean you were in Death Row all by yourself? A. There was one inmate two cells from me.

Q. Who was that? A. That was Rollie Laster.

Q. Where was Ford? A. Ford, he was a few cells up the line toward the west.

Q. And where was Coffman? A. He was in the same direction up that way.

Q. And where was Booker? A. He was up near the west end.

Q. And where was Heaton? A. He was next door to me.

Q. And where was Reece? [618] A. He was up on the far west end.

Q. Now, you were next to the shower, weren't you, just west of the shower? A. Yes, sir, I was.

Q. Now, if the testimony has been that No. 22 is the shower, you would have been in 23, is that right? A. If 22 was the shower, I was in 23, yes.

Q. Now, where was Laster? A. He was one cell east of the shower.

Q. Then he would have been in 21? A. Yes, he would have.

Q. And who was in 24? A. 24, that would be the cell next door to me, would be Heaton.

Q. And anybody in 25? A. I believe Hoffman was in that cell.

Q. Hoffman? A. Yes, sir.

Q. And 26? A. Ford.

Q. And 27? A. I don't recall anybody being in that cell.

Q. All right, twenty-eight? A. I don't recall anybody being in that cell.

Q. And 29? A. I don't believe anybody was in that one either.

[619] Q. 30? A. Booker, I think Booker was in 30 or 31.

Q. And 32? A. That was Reece.

Q. Then when these Patrolmen questioned you there in your cell, there were other inmates all around there, weren't there? Heaton was right next to you, just two feet from you? A. Heaton was next door, yes.

Q. And Rollie Laster was just one cell that separated you? A. That is correct.

Q. Now, could those two inmates have heard what the Patrolmen said to you?

MR. HENNELLY: Object to that, being a conclusion on the part of this witness.

Q. Did he question you in a loud voice?

THE COURT: Sustained.

A. No, sir, it wasn't Mr. Riley.

Q. Well, they weren't inside of the cage, they was in the aisle out here? A. Yes, but they was in a low voice, they wasn't what you would call a loud voice. I think more of a normal tone of conversation would cover it.

Q. Now, you say that, do you know DeLapp? A. Upon sight only.

Q. And you went up to B Hall, and who were you with? [620] A. Don Lyons and Bill Crabtree.

Q. And who else? A. Those were the only two that I went upstairs with. When I got up there, there was another guy named Reed, he was with us.

Q. And who else? A. Those were the only ones.

Q. All night long? A. Those are the only guys that I was with during the entire night, yes.

Q. All right. Now, I will ask you if you recall when the loud speaker was brought in that night? A. No, sir, I don't.

Q. You don't? A. No, sir.

Q. Did you hear a loud speaker? A. Well, I heard some noise, and there was so many different noises Mr. Riley. I can't say whether I heard a loud speaker or not. Several radios were going.

Q. I will ask you if you weren't with DeLapp, Hoover and Laster in B Hall when the loud speaker was brought in?

MR. HENNELLY: Object for the reason that the time is not sufficiently fixed, and the question is too vague, indefinite and uncertain, particularly since the witness has testified that he doesn't know about the loud speaker.

THE COURT: The witness testified of course who he was with, [621] and the Prosecuting Attorney would have a right to cross examine him upon that. The objection will be overruled.

Q. Were you or weren't you? A. I don't recall a loud speaker Mr. Riley.

Q. I am asking you, were you with DeLapp, Laster and Hoover? A. No, sir.

Q. At no time during that night up in B Hall were you with those three inmates? A. The only time I seen DeLapp that night, he was standing on the steps of B and C Hall.

Q. And when was that? A. That was when I first went upstairs.

Q. And what time was that? A. I don't know the exact time, I would say around eight o'clock.

Q. You stayed in the cell all the time? A. My cell?

Q. Whatever cell you went to? A. Part of the time, yes.

Q. What did you do the rest of the time? A. Well, about midnight, we stayed there and listened to the radio, and several news casts were coming over about the riot, and we drank some coffee.

Q. What else? A. And then—

[622] MR. HENNELLY: Speak loudly, the Reporter is having difficulty, and he has to write it.

A. Lyons and myself, we walked up and down the hall of B Hall.

Q. What hall? A. B Hall.

Q. How long did you walk? A. I don't know, not too long, probably an hour.

Q. What else did you do? A. And then we went back to the cell.

Q. What cell? A. I really don't have any way of knowing whose cell, who is up there Mr. Riley.

Q. Well, was it Lyons' cell? A. I don't know whether it was his cell or not. I can't say to my own knowledge.

Q. Did you stay in that cell the rest of the night? A. Yes, sir.

Q. Did you see Shaky Dietzel up there that night? A. No, sir, I didn't.

Q. Never saw Dietzel? A. No, sir, I didn't.

Q. I believe you testified that you were hung up by this rope down in the field house fifteen minutes? A. I certainly was, yes, sir.

Q. I will ask you if you can stand up here and show this Jury just how that was done? [623] A. Mr. Riley, I believe that we could show it better if you would bring a rope and handcuffs in here and I can demonstrate it.

THE COURT: Can you stand up and show how it was done, is the question, the position that you were in.

A. I don't believe I can stand up and show you how it was done.

Q. You don't believe you could do it? A. But I think I can explain the procedure to you from this chair.

Q. I was just wondering if you could show the Jury, but you don't think you can do it? A. I was brought in and I was told to sit in a chair, or seat.

Q. Now, that is, I asked you if you could stand out here and show this Jury just how you were hung up. A. My hands and cuffs and belt were behind me.

Q. They were cuffed? A. Yes, sir. And my ankles were cuffed and the belt and then I was lifted off of the floor.

Q. Which way? A. I was lifted off of the floor by a policeman, and after I was so many inches off the floor, the rope was tied, and what I believe is a web partition and the rope was tied in there, and I was dangling in mid-air.

[624] Q. What is a web partition? A. It is, I would call it a partition that separates the room which we were in, and another room, but it has those square holes in it, probably that big a square.

Q. The partition does? A. I believe it does, yes.

Q. Well, what was the rope tied to? A. Well, the end of the rope was tied into this partition.

Q. Tied into it? A. I believe it was, yes, sir.

Q. Where was the other end? A. The other end was on the ceiling.

Q. Now,— A. In some fashion.

Q. What fashion? A. When I was hanging up in that position, I didn't look to the ceiling and I don't believe I could have looked at the ceiling if I wanted to.

Q. Now, how long were you down there? A. How long was I down there?

Q. Altogether? A. Altogether?

Q. Yes. A. In that building?

Q. Yes. A. I don't know definitely, but I believe that I went down around ten A.M. in the morning and left somewhere around 12:30.

Q. And you just hung out in the middle of that room? [625] A. No, not in the middle of the room.

Q. Well, where was it? A. As you come in the door it was on the left hand side and near the center of the room. That is near the center going toward the end.

Q. These Policemen just held you up like that and tied you, is that right? A. The rope was already tied on the handcuffs before I was held up. The rope had already been attached to the handcuffs before they held me up, and after I was held up off of the floor, they released me. They released their hold from me, but I remember one of the officers said let him down real easy, because if you let him down, let him drop, he will break both arms, and so they eased me down gently.

Q. If you fell on the floor, if they let you down hard and you fell on the floor, it would have turned your arms loose, wouldn't it?

MR. HENNELLY: Object to that as argumentative.

A. At that time Mr. Riley—

THE COURT: Overruled.

A. At that time Mr. Riley—well not with the end of the rope attached to the web partition, no, sir, and also attached onto my arms.

Q. Well then, you were leaning against the partition, weren't [626] you? A. No, sir. However, I was close enough to the partition where that I could draw my legs up and touch the partition.

Q. Well, if this rope went through the partition, and the other end was on your arms, and they raised you up, wouldn't you be against the partition? A. No, sir, I wouldn't be Mr. Riley, because the way this rope was,

I would say that it was attached to the ceiling probably eighteen inches from this web partition.

Q. Oh, it was attached to the ceiling? A. Attached to the ceiling and then connected to the web partition.

Q. And was there more than one rope down there? A. Oh, I only seen the rope that I was hanging with.

Q. Well, they cut you down after the first fifteen minutes? A. Yes, they released me after fifteen minutes.

Q. What did they use for a rope the second time? A. The same rope.

Q. Well, they just cut it? A. I didn't say they cut it.

Q. Didn't you say they cut you down? A. I said they released me.

Q. I will ask you if on direct examination, you didn't say they cut you down after fifteen minutes? A. Well, they released me after fifteen minutes.

[627] Q. They released you, then they didn't cut you down? A. Well, I would express it even like that Mr. Riley.

Q. What? A. I would even express it that they did cut me down. That is saying that they released me.

Q. Now, which arm was paralyzed? A. My left one.

Q. Did it injure your right one at all? A. Yes, sir.

Q. What did it do? A. It, my handcuffs, they slipped down over this heavy coat sleeve, and it scarred it.

Q. Did it scar your right arm? A. Yes, sir.

Q. How big a scar? A. Well, I believe it circled my wrist.

Q. How long did that scar last? A. That was ten months ago, it wasn't a few days.

Q. Well, did you have that scar circling your wrist when you got to the Springfield Penitentiary? A. Yes, I did.

Q. Did you show it to them? A. Yes, sir, I did. But I was mainly concerned about my left hand, because it was paralyzed and numb. That is the one I talked to the doctor about mostly.

[628] Q. But did you show them that scar? A. As I said Mr. Riley, I was mainly concerned with my left hand, and arm, and my fingers were drawn up.

Q. I didn't ask you that, I asked you if you showed them that scar at Springfield, the one that circled your wrist? A. The one that circled my right wrist?

Q. Yes. A. I believe that I did Mr. Riley.

Q. Well, did you or didn't you? A. I would say that I did, yes.

Q. All right. What other scars or bruises did you have on you? A. I had scars and bruises on my legs.

Q. Now, which leg? A. On both of them, around my ankles.

Q. Now, where on your legs? A. On the shins and the ankles.

Q. Have any on your stomach? A. Yes, sir I had bruises on my stomach.

Q. And all these bruises lasted until you got to Springfield? A. Yes, sir, at least I recall soreness.

Q. Well— A. I know that when I would go to bed at night, I was awful sore all over.

Q. Now, were there any on the upper part of your legs? A. On the upper part of my legs?

Q. Yes. A. I don't recall at this time Mr. [629] Riley. I would say there were bruises, but I wouldn't say there were scars there.

Q. Bruises? A. Yes, sir. I know that, that I was beaten all up and down my legs.

Q. Were you beaten about your head and face? A. No, sir, I wasn't.

Q. Were you slapped or hit? A. No, sir, I wasn't, not with the open hand or the fist.

Q. Were you beaten about your chest or back? A. Yes, sir, about my chest and stomach.

Q. Did you have any bruises on your chest? A. I don't know Mr. Riley. The reason I can't answer that is because when I was hanging in that position, the torture that was so unbearable, and causing me so much trouble, that my shoulders and arms, and that made the other seem minor.

Q. Your Honor, that is not responsive to the question.

THE COURT: I don't know, the objection will be overruled, the witness may answer.

Q. All right. A. I said at that time when I was hanging in that position that the pain in my chest and in my shoulders and in my arms was so unbearable, that the licks that were put on me, that is with the sticks and clubs by the police officers, they really didn't hurt too bad Mr. Riley. I knew it was being done, but the greater [630] pain was up here from being hung up, and that kind of made the licks seem minor to me, and I just knew they were being inflicted upon me.

Q. Well, after that, did you have any bruises on your chest? A. Since I don't recall any, I would say no. There was some soreness in there though.

Q. Now, what was the condition of your left hand on the morning of September 29th? A. On the morning of September 29th, my fingers were drawn up in that fashion and I still have one scar here where the cuffs bit into my hand.

Q. How big was that scar? A. You can see it yourself. It covers about the size of a nickel I would say.

Q. What part of your arm was it on? A. Right here, right at the wrist.

Q. Well—

THE COURT: You pointed— A. Yes, it is right here, is where it is.

THE COURT: Below your wrist?

A. Yes, sir.

MR. RILEY: Could you hold your other fingers out? A. Yes, sir, I could.

Q. Mark this Exhibit 17.

[631] Reporter marked Exhibit 17, a photograph.

Q. Mr. Stidham, I will show you what has been marked State's Exhibit No. 17, and do you know what that is, can you tell what that is?

MR. HENNELLY: Excuse me, before they even do this, I think even for the purposes of identification, identifying this picture, I think that I will object to that, even having him identify it, for the reason it is highly prejudicial, and the picture itself is prejudicial, and is done to prejudice this Jury, and it doesn't tend to prove or disprove any issue in the case, and to even have him identify it, invites prejudice to this Jury, and against this Defendant.

THE COURT: Well, of course any exhibit can be identified. Your objection will be overruled.

MR. RILEY: (Out of the hearing of the Jury) If the Court please, if I can identify the whole picture, we will take a scissors and slice out him, I want to show, I want to show his left hand.

THE COURT: When was this taken?

MR. RILEY: September 29, Nine A.M., excuse me, about eleven A.M.

THE COURT: The objection will be overruled.

MR. HENNELLY: Very well.

MR. HENNELLY: This is for the purpose of identification now.

[632] Q. Stidham, do you know what that exhibit is? A. Yes, sir, it is a picture that was taken I believe in the Cole County Court House.

Q. That was taken on the morning of September 29th, just before you went to Springfield? A. I couldn't say whether it was on September 29th or not, Mr. Riley, because they had me in this Court Room on several occasions, and each time there was pictures snapped of us.

Q. You won't say that was September 29th? A. I can't say it for sure, no, sir.

Q. Then can you tell from this photograph whether or not it was after you were questioned in the recreation room and before you went to Springfield, when this photograph was taken? A. Could I tell whether it was?

Q. After— A. Before we appeared in Springfield?

Q. Before you went to Springfield, but after you were questioned in the athletic room? A. No, sir, I couldn't Mr. Riley, because I believe we appeared in that Court Room, and probably appeared in the same position here several times within a six day period.

Q. Will you take a look at the Judge on the bench? A. I believe we appeared before this Judge three times and probably four. There is another picture that was taken when [633] we got on the bus. I would recognize it.

THE COURT: Were you taken to the Cole County Court House prior to the time that you were questioned on September 27th, 1954, at the field house? A. No, sir, I wasn't.

Q. Were you taken there between the 27th, the time you were questioned, and before you went to Springfield? A. You mean after the questioning?

Q. Were you taken to the Court House after September 27th, after the questioning, and before you went to Springfield? A. Yes, sir, I was.

Q. How many times? A. One time.

THE COURT: All right, go ahead.

MR. RILEY: I will ask you Mr. Stidham, does your photograph appear on there?

A. Yes, sir, it does.

Q. And does that photograph include your left hand? A. Well, it includes the thumb and this finger here, yes.

Q. And you recognize this officer standing here, the officer standing to your left? A. I recognize him as the St. Louis Policeman, yes.

Q. And you saw him on the witness stand here yesterday, didn't you? A. Yes, sir, I did.

[634] Q. Officer Billings? A. That is right.

Q. All right, I think that is all. A. There was a picture taken Mr. Riley of us getting on the bus that shows a real fine picture of my left hand and in fact it shows the scars that I had on it.

Q. Who took the picture? A. Well, the photographer for the Jefferson City newspaper.

Q. Will you mark this Exhibit 18, and will you mark this Exhibit 19?

Reporter marked Exhibit 18, a letter addressed to Sam C. Blair from Mr. Stidham.

Reporter marked Exhibit 19, a letter to Mr. Bredeman from Mr. Stidham.

Q. Mr. Stidham, I show you what has been marked Exhibit No. 18, and will ask you if that exhibit is in your handwriting? A. Yes, sir, that is my handwriting.

Q. And Exhibit No. 19? A. Yes, sir, that is my handwriting also.

Q. And what day was Exhibit No. 18 written? A. On December 7th, 1954.

Q. And what day was Exhibit No. 19 written? A. February 23rd, 1955.

Q. Where were you when you wrote those? A. I was in Death Row in the Missouri State Penitentiary.

[635] Q. You were in your cell? A. I was in my cell, yes, sir.

Q. At this time we offer Exhibit 18 and Exhibit 19, for the purpose of comparison of handwriting, with Exhibit 16 and 16-1.

MR. HENNELLY: I am going to object to their introduction, and I am going to ask that counsel be reprimanded for attempting to introduce them, for the reason that there has been no question raised but what Exhibit 16 and 16-1 is in the Defendant's handwriting, and the Defendant has admitted and stipulated that it is in the handwriting, and the only purpose of submitting these exhibits before this Jury is for the purpose of getting foreign extraneous material before this Jury, which will bias and prejudice the rights of this Defendant, and deprive him of certain Constitutional Rights, totally irrelevant and immaterial to any point in issue in the case, and beyond the scope of examination in chief.

THE COURT: The question of his handwriting is not beyond the examination in chief. He has testified that he signed this and he has testified as to what happened to him prior to his signing it. Therefore, anything in connection with his handwriting and the legibility, etc., and his physical condition would be pertinent to the issues in the case, and within the scope of his direct examination. Now, I don't know what these letters contain.

[636] MR. RILEY: You can, if the Court wants to, he can cut the matter out of the letter and let them see the signature.

THE COURT: You can't cut the material out without cutting the letter out, the writing, and your purpose in your offer of this is merely for comparing the handwriting.

MR. RILEY: You can cut the Very Truly Yours off of that and have his signature.

MR. HENNELLY: Object to it because there has been no question raised, and since this was not written with the same hand, this man is right handed, and the injury was to the left hand, he makes no claim that there was any paralysis to the right hand, he makes no claim that it is not his signature.

THE COURT: No, but he has testified that he was hung up there about fifteen minutes and was taken down, and told to write Exhibit 16 and 16-1, and then they took him back and hung him up ag[illegible] for he didn't know how long, but he heard one of the officers say he had been up there at least thirty-five minutes, and that would be a total of fifty minutes within a space of from ten to twelve or twelve-thirty, which included some questions and answers and writing, and that this all took place and then he was brought down and told what to write and did write Exhibit 16 and 16-1. Now, I think it is within the scope of the examination of this case, that the handwriting would be pertinent to the issues, [637] and within the scope for comparison, and the Jury would be entitled to compare it and see. They have a right to pass upon the credibility of his testimony.

MR. HENNELLY: I certainly think that the whole body of those letters—

THE COURT: That is the only thing that has me confronted, that there may be things in the body of the letter which can't be eliminated.

MR. HENNELLY: If the Court lets them see the signature, that is one thing.

THE COURT: All right, I am ready to rule on this.

MR. RILEY: If the Court please, I have another one which—

THE COURT: I think that for the purposes which this is offered, and because of the fact that there may be

matters in the letters which are not pertinent to the issues in this case, and only for the purpose of comparison of handwriting, that the Court will permit Exhibit 19—let's go to Exhibit 18, that typewritten portion and the address to whom the letter is directed, which is Sam Blair, relationship—business, Cole County Court House, City of Jefferson City, December 7, 1954, Dear Judge Blair: Pursuant to your suggestion in open Court yesterday, I am mailing this letter to you—from there on down, it will be out until the paragraph, Trusting to hear from you in the near future, I remain,—and what is it, the salutation, Respectfully Yours, James W. [638] Stidham, 65993, B-B., will be allowed in evidence, the balance of the two paragraphs in between what I have just read will be cut out, and I think a piece of paper can be laid on there.

MR. RILEY: You mean cut this out?

THE COURT: It looks to me like a paper could be laid across there and just pasted on. Exhibit 19, the typewritten portion at the top and the name to whom addressed, and the reason for it, and then, Dear Mr. Bredeman:, and then at the bottom, Trusting to hear from you at an early date, I am, and Very Truly Yours, James W. Stidham, 65993, those parts may be in, and the two paragraphs after Mr. Bredeman, the name, and Trusting to hear from you at an early date, will not be in.

MR. HENNELLY: Let me renew this objection.

THE COURT: All right.

MR. HENNELLY: I am objecting to the use of both of these exhibits because they are hearsay, and even in the form which the Court presently suggests that it is going to permit the Jury to examine them, for the reason that is, these are questions which go to expert testimony. It is going to be a matter that is going to confuse the Jury. It is going to give them a roving commission on matters com-

pletely extraneous, immaterial to any point at issue in the case.

THE COURT: The objection is overruled.

Exhibit 18, having been received in evidence, that [639] portion which was received in evidence, reads in words and figures as follows:

Missouri State Penitentiary, Box 900, Jefferson City, Mo. Name—Honorable Sam C. Blair, Relationship—Business Street No. Cole County Court House, Jefferson City, Missouri

December 7, 1954

Dear Judge Blair:

Pursuant to your suggestion in open Court yesterday, I am mailing this letter to you.

Trusting to hear from you in the near future, I remain,

Respectfully Yours,

/s/ James W. Stidham
65993
B-B.

Exhibit 18
LWE
7/20/55

Exhibit 19, having been received in evidence, that portion which the Court permitted in evidence, reads in words and figures as follows:

Missouri State Penitentiary, Box 900, Jefferson City, Mo. Name—Mr. Louis E. Bredeman Relationship—Busi-

ness Street No.—Cole County Courthouse, Jefferson City, Missouri.

February 23 - 55

Dear Mr. Bredeman:

[640] Trusting to hear from you at an early date, I am,

Very Truly Yours,

/s/ James W. Stidham
65993

Exhibit 19
LWE
7/20/55

THE COURT: We will take a short recess. Now, will the people in the Court Room just remain seated where you are until the Jury passes back through the Court Room and goes back to the Library Room, because it is a lot cooler back there.

MR. RILEY: I am going to go back to State's Exhibit No. 18 Stidham, now that is your signature on that exhibit, isn't it?

A. Yes, sir, it is Mr. Riley.

Q. You put it on there? A. Yes, sir, I did.

Q. And the other writing that is shown on there is your writing too, isn't it? A. No, sir, not all of it.

THE COURT: There of course is the exhibit number and the notation there of the court file.

A. Other than those two.

THE COURT: Exclusive of this exhibit number and these words, [641] Court File, and the typewriting, is the balance of it in your handwriting?

A. Yes, sir, it is.

MR. RILEY: Now, Exhibit No. 19, exclusive of the exhibit marking there and the black ink showing Court

File, and the typewriting, is the rest of it in your handwriting?

A. Yes, sir, it is with exception of the date received.

THE COURT: Just circle the Exhibit number and the received number and the Court File, and do that on the other one too, and it will be all right. The Court File and the exhibit number.

MR. RILEY: If the Court please, I would like to pass these to the Jury along with Exhibits 16 and 16-1.

THE COURT: Is there any reason why you couldn't go ahead and complete your cross-examination before those are shown to the Jury? It is just a matter of time. I think we could probably save a little more time if we continued with your cross-examination.

MR. RILEY: Stidham, at the time you say you were hung up the first time, fifteen minutes?

A. About that time Mr. Riley.

Q. And the second time thirty-five minutes? A. Yes, sir, I make that estimate on what I heard one of the officers say.

Q. Now, as you were hanging there with your arms behind you, [642] and ropes tied through the handcuffs, did you balance, or did you tip? A. Well, I didn't balance, no, sir.

Q. Which end of you tipped, your head or your feet? A. This part of my body up, from my waist up.

Q. That tipped to the ground? A. Yes, sir.

Q. Well, did you fall, did you tip far enough to go to the ground? A. No, sir.

Q. Well, I will ask you if you could stand in front of the Jury and show the Jury what position you were in after you tipped or tilted?

MR. HENNELLY: Come down in front of the Jury box Mr. Stidham.

A. Well, gradually, as I was hanging with my arms increasingly raised, and my body was probably bent over in that fashion.

Q. That fashion? A. Something like it.

Q. And you didn't tip all the way over? A. No, sir, I didn't.

Q. And after your feet were off the ground, you say you didn't tilt or tip, or turn over? A. No, sir. I believe Mr. Riley, if we had a rope and handcuffs, I believe we could put it over there, over that door [643] and give a good demonstration of that.

MR. HENNELLY: It is agreeable to me.

Q. You can do it if you want to.

MR. HENNELLY: Get a rope and some handcuffs.

THE COURT: Let's not proceed further on that until we discuss it.

MR. HENNELLY: Very well Your Honor.

Q. I believe you testified yesterday that the bruises were all over your legs? A. Yes, sir, bruises were on my legs.

Q. Were they all over your legs? A. I know they were mainly on my shins Mr. Riley, and around my ankles.

Q. Up in O Hall, you and Lyons just walked around? A. You mean in B Hall?

Q. I mean B Hall, yes. A. Yes, sir.

Q. Where was Crabtree? A. Since he wasn't in my sight at that time, I can't say.

Q. Did you just testify that you were in the cell with Lyons and Crabtree? A. Yes, sir, I did.

Q. Where was Reed? A. He was there.

Q. How long did those boys stay with you? A. I would say until midnight.

[644] Q. You didn't see Dietzel up there at all? A. No, sir, I didn't. This was on the first floor of B Hall.

Q. Did you ever go back downstairs into B basement? A. No, sir, I didn't Mr. Riley.

Q. Never did? A. No, sir, I didn't.

Q. What time did you come out of B Hall? A. You mean after the riot was over you mean?

Q. Well, what time? A. You mean after the riot was over?

Q. Yes, whenever you came out? A. That is when the Troopers came in and taken us out.

Q. What time was that? A. It was around seven o'clock in the morning.

Q. Now, you say you think it was an inmate by the name of Ford that let you out? A. Yes, sir, I do.

Q. Well, now, you know Ford well, don't you? A No, sir, I don't know him well Mr. Riley.

Q. Well, how long had you been in Death Row before September 22nd, 1954? A. Not quite two months.

Q. Not quite two months? A. No, sir.

Q. Ford was there all the time, wasn't he? [645] A. I believe he was, but he wasn't in my sight.

Q. Well, how many times have you seen Ford since then?

MR. HENNELLY: Object if Your Honor please, that is beyond the scope of the examination in chief, and irrelevant and immaterial to any point at issue in the case.

THE COURT: The objection is overruled in view of the witness' statement previously to this Court. Overruled. Have you seen him since?

A. Possibly I have, but I frankly don't recall looking directly at him since then.

MR. RILEY: He celled in Death Row up to a short time ago, didn't he? A. Yes, sir, he did.

Q. And you are celling in Death Row, and have been since November of 54? A. You never get a chance to see those other prisoners down there Mr. Riley.

MR. HENNELLY: Speak up there, this man has to write everything down.

Q. You— A. You seldom ever get a chance to see other prisoners down there, unless you stand at your door all the time and see one come by. When I said I thought Mr. Ford opened, Charley Ford opened my door, my door was opened there and there was a lot of excitement down there, many many men running [646] backward and forward, and all the lights had been knocked out, and windows had been knocked out, and I didn't pay too much attention to who did open my door, but I do believe Ford did. I know there was a colored guy opened my door.

Q. Now, who did you give your watch to? A. Leon Wade.

Q. Who? A. Leon Wade.

Q. Does he go by the name of Blue? A. Yes, he does.

Q. Now, did this hanging up, did that hurt your right arm or your right hand any other way than to scar it, as you mentioned? A. It made a bruise on there Mr. Riley.

Q. A bruise that went around your wrist? A. Yes, it went around my wrist. I wouldn't say that it circled my entire wrist, but it was around my wrist.

Q. How wide was it? A. I don't think I could estimate it accurately, but I would say that it was probably half an inch or maybe a quarter.

Q. How wide are the handcuffs? A. Well, I can't say.

Q. But you were able to write with your right hand after you were hung up? A. Yes, sir, I was able to write. However, I think I had a [647] lot of dead weight on the pen when I was writing.

Q. Well, how soon after you were let down after the second hanging, which was about thirty-five minutes, did you start to write? A. It must have been probably five minutes or so, because when I was let down the second

time, these two fingers here seemed to be in a spasm, like a spasm, and kind of a nervous spasm, and jumping and there was some handballs in the shack, in the field house, and one of the officers gave me one of those handballs to squeeze in my hand.

Q. Now, you have, don't you, a large scar on your left hand? A. I wouldn't call it a large scar, it is the place where I had a wart removed.

Q. You mean on the inside? A. On the inside. I used to catch ball and that is where I had a callous on there from catching baseball.

Q. Isn't that a large scar there? A. That is what was a callous, and in fact I always did refer to it as a callous, and never was cut there or anything.

Q. What is that? A. That right there, that is something I got while I was up in jail.

Q. How long have you had that injury or scar or whatever you [648] want to call it, to your left hand? A. Are you talking about where I had the wart removed?

Q. What? A. Where I had the wart removed?

Q. No, up in the palm of your hand there over your two little small fingers? A. I never did consider it no injury Mr. Riley, because the only reason that that got there, was because I used to catch hard ball, and that made a callous there.

Q. How long have you had that? A. Probably ten years.

Q. Did you ever hurt your fingers when you were catching hard ball? A. No, sir.

Q. Never did? A. Well, when I say that I never did hurt them, I mean where the injury lasted any length of time.

Q. A ball never did hit your fingers at all? A. Certainly it hit my fingers.

MR. HENNELLY: Object to that, I think that this is
yond the scope of the examination in chief.
bey THE COURT: Well, sustained. I think, I don't think
i need to go any further in that.
you Q. I believe that is all.
[649] *Redirect Examination by Mr. Hennelly*
Q. Mr. Stidham, was there anything the matter with
muscles of your left hand prior to the time that you
the nt into that shack? A. No, sir, my hand and arm was
wer very good shape at the time I went into that shack.
in Q. You had no paralysis or anything like that to the
hand, is that right? A. Certainly not.
left Q. No further questions.
MR. RILEY: That is all.
MR. HENNELLY: Step down.
MR. RILEY: May I pass these at this time?
THE COURT: Yes, you may. (Out of the hearing of
Jury) I wonder Mr. Riley, if for the purposes of these
the ibits, the Court might mention that the reason they
exh being passed to the Jury is for the handwriting? I no-
are one Juror beginning to read both exhibits. It has
tice eady been around. I don't know if it would be guilty of
alre mmenting on the evidence or not. I might just caution
con Jury to read the front of the pages, and just for the
the pose of comparing the handwriting.
pur MR. HENNELLY: I think that under these circum-
nces, with 16 and 16-1 going before the Jury, that under
star se circumstances, that it amounts to undue emphasis on
the section of [650] the testimony, and that is the ex-
one it. I am afraid that under these circumstances, no mat-
hibi what the intention of anybody is, that we are going to
ter up with putting too much emphasis on Exhibits 16 and
end 1. It is going to be in effect, a comment on the evidence.
16-
THE COURT: It is an exhibit before this Jury. I
ld state to the Jury the purposes for which it is being
cou

offered, but I don't want to do it, because it might be a comment on the evidence. I was merely going to call the Jury's attention to the fact that Exhibit 16 and 16-1 has already been around, and that these would be together, and only for the purpose of comparing the handwriting, so that they would just glance at it. That would be the purpose. I will tell you one thing I am going to do Gentlemen, I want to call these exhibits back here, and they will have to go together, and I want to call the Jury's attention to the fact that Exhibit 16 and 16-1 has already been introduced into evidence, and has been passed before the Jury, but I want the three exhibits to go down the line together and not separate. Mr. Ehlers, does your record show that all of this has taken place outside of the hearing of the Jury?

MR. EHLERS: Yes.

THE COURT: Very well. The reason the Court made the statement he did a while ago for the Jury, he noticed one of the jurors was reading Exhibit 16 and 16-1, and the Prosecuting [651] Attorney at the time the exhibits were identified, said he was only offering them for the purpose of comparison, inasmuch as Defendant will not agree that the Court may state that to the Jury, that it is only for the purpose of comparison of the handwriting, and the Court feels that such a statement by the Court would be a comment on the evidence, the Court asks that the three exhibits be brought back and then passed around together. I guess we could have gone ahead without passing this to the Jury at all. It would have been a question of argument or that the Jury could see at the time of argument, but the Jury has a right to see the Exhibits, and they were received in evidence, and it is just a question of saving time. I don't want to comment on the evidence, and I didn't intend to comment on the evidence. I was just merely trying to save time, after I

saw one Juror reading over again Exhibit 16 and 16-1. That Exhibit was read to the Jury by the Prosecuting Attorney, and then handed to the Jury, and some of the Jurors even read it as it was handed to the Jury before, and I didn't see any point in wasting all of the time of them reading it over again, and I think they thought it was probably a new exhibit and was checking it. I don't know what they thought. That is why I wanted them, as they go down the line, they can do with them whatever they want to. They can draw from them what they want to.

[652] MR. HENNELLY: Don't say anything further, they might do with them what they should do.

MR. RILEY: I would like to recall the Defendant for one more question.

THE COURT: Mr. Stidham, will you come back to the stand?

MR. RILEY: Mr. Stidham, you testified you went to Springfield on September 29th?

A. I believe that was the date.

Q. You recall what time you left Jefferson City? A. It was before noon.

Q. What time did you get there? A. It was in the late afternoon.

Q. Were you handcuffed? A. Yes, sir, I was.

Q. You had leg irons on? A. Not at the time I went to Springfield, no.

Q. I mean when you left Jefferson City on the trip to Springfield? A. Did we have leg irons on?

Q. Yes. A. No, they took the leg irons off immediately after we walked out of the Court Room, after arraignment.

Q. That is all.

MR. HENNELLY: That is all, come down.

[653] M. E. CURTIS,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Hennelly

Q. What is your name please sir? A. M. E. Curtis.

Q. You have been previously sworn to testify in this case, and what is your occupation sir? A. Records Clerk at the Medical Center of the Federal prisoners at Springfield, Missouri.

Q. That is the Federal Prison down there sir? A. It is a combination hospital and prison.

Q. And are you custodian of the records down there? A. I am.

Q. And do you keep the records of the people who have been there in the normal course of business? A. Those legally committed.

Q. And I will ask you sir, if pursuant to a subpoena duces tecum issued by His Honor out of this Court, did you bring with you one of those records? A. I did.

Q. Is that the record of one James Stidham? A. It is.

Q. And you are custodian of that record are you sir? A. Yes, sir.

Q. And this is a permanent record of your institution, is that right? [654] A. Yes, sir.

Q. Now, I am going to hand you what has been—

MR. HENNELLY: (Out of the hearing of the Jury) I think we are getting into a situation with respect to the introduction of this, aren't we? I think Your Honor received it for certain purposes, and then indicated that you would want to have me resubmit it.

THE COURT: I think for the purposes of being before the Jury, you can re-identify what this is, and it has previously been marked.

MR. RILEY: You are going to put the doctor on the stand?

MR. HENNELLY: Yes.

THE COURT: I think it probably should be in evidence anyway.

Q. Now sir, I am going to show you what has been marked for the purpose of identification, Defendant's Exhibit E-2, and I will ask you sir if that is one of the permanent records? A. It is.

Q. And is this the record of one James Stidham? A. It is.

Q. And I will ask you, this material which is written in ink, you know in whose handwriting that is? A. Dr. F. L. Halleck.

Q. And who is Dr. Halleck? A. He was the Public Health Doctor assigned to the Medical Center for the Federal prisoners at Springfield, Missouri.

[655] Q. Is he still with the institution? A. He is not.

Q. And do you have any idea who wrote this top part? A. No, it is one of the board at the institution made that part.

Q. One of the board? A. Guard.

Q. One of the guards? A. Yes, sir.

Q. I will ask leave to introduce E-2, Exhibit E-2.

MR. RILEY: I don't have any objection.

THE COURT: All right, it may be received in evidence.

Exhibit E-2, having been received in evidence, but not being in the hands of the Reporter at this time, is not copied into this record.

Q. Now then sir, I want to show you what has been marked, for the purpose of identification, as Defendant's

Exhibit E-1, is that part of the permanent records of the case of James Stidham sir? A. It is.

Q. And are these the records which are kept in the normal course of business at the hospital? A. Yes, sir.

Q. You are custodian of those records? A. Yes, sir.

[656] Q. And they are the permanent records, is that correct? A. Yes, sir.

Q. I am going to ask you sir, are you familiar with that handwriting? A. I am.

Q. Whose handwriting is that? A. Dr. Hatcock's.

Q. Who is Dr. Hatcock? A. He is the public health physician assigned to the Medical Center for Federal prisoners.

Q. And is he still down there? A. He is.

Q. I will ask leave to introduce this into the record.

MR. RILEY: You say Dr. Hatcock is here and is going to testify?

MR. HENNELLY: Yes.

MR. RILEY: If that is so, I have no objection.

THE COURT: All right, it may be received in evidence.

Exhibit E-1, having been received in evidence, but not being in the hands of the Reporter at this time, same is not copied into this record.

Q. I have no further questions.

Cross-Examination by Mr. Riley

Q. Will you mark this Exhibit 20?

[657] Reporter marked Exhibit 20, fingerprint record of Stidham.

Q. Mr. Curtis, I will show you what has been marked as Exhibit No. 20, consisting of two pages, and will ask you if that Exhibit is part of the same file which you just identified for Mr. Hennelly? A. It is a photostatic copy of the fingerprint, that is part of the file which I just referred to.

Q. And is that a part of your permanent record there at the Federal Prison in Springfield? A. I don't know just how to answer your question. The fingerprint chart in the back is a part of the permanent record, yes, and this here happens to be a photostatic copy of it.

Q. Have you got an original here? A. There is an original here. I don't see it right now.

MR. HENNELLY: I don't see any point in encumbering the record, I think for the purposes of introduction of that Exhibit Your Honor, it may be agreed that that is a photostat of the original. I don't mean to waive my objection to it.

THE COURT: Who prepared that sir?

A. I photostated it.

THE COURT: Who took the fingerprints?

A. My assistant, Mr. Patana.

THE COURT: Were you present?

[658] A. I was present in the office.

THE COURT: All right.

MR. RILEY: Now, I will ask you, on the second page, were you present when that information was taken?

A. Yes, I was.

Q. If the Court please, at this time we offer this exhibit in evidence.

MR. HENNELLY: The Defendant will object to it, if Your Honor please, for the reason that it is hearsay and that wouldn't tend to prove or disprove any issue in this case.

MR. RILEY: Was the Defendant present when this was prepared?

A. Not the photostat, no.

Q. I mean the material that is on there? A. Yes, sir.

Q. And was he there present when the information on the second page was taken? A. Stidham was present.

MR. HENNELLY: Still object to it for the reason that it contains certain hearsay testimony, and testimony, evidence which is totally irrelevant and immaterial and highly inflammatory, and only tends to bias and prejudice the minds of the Jury, and to introduce it under these circumstances would be a violation of the Constitutional Rights of the Defendant.

MR. RILEY: I offer it for impeachment purposes.

[659] THE COURT: Mr. Curtis, did you hear the Defendant give the information that is contained on the second page of Exhibit 20?

A. Mr. Patana, as I remember it, interrogated Stidham himself and recorded what description has been noted on that card.

THE COURT: Were you present there?

A. I was in the office all the time that the six of them were being processed. I didn't do any of the interrogation.

MR. RILEY: Did you hear Mr. Stidham give these answers?

A. I did.

THE COURT: All right, Exhibit 20 may be received in evidence.

Exhibit 20, having been received in evidence, the part which can be copied into this record, reads in words and figures as follows:

Fingerprint Record of James William Stidham.

Page 2.

Received—9-29-54-MCFP Mo. State Prisoner Trf. to MCFP

Crime—Robbery Sentence—25 yrs.

Date of Sentence—5-26-52 Sentence begins 5-26-52

Sentence expires—5-25-77

Good time sentence expires 5-25-71

Date of Birth—2-2-1920 Occupation—Auto mechanic

Birthplace—U.S.A. Nationality—American

Age 34 Complexion—Medium Height .....

Eyes—Brown Weight ..... Hair—Lt. Brown Build—Med. [660] Scars and marks—1. Tatt. word Frances vertical spelling forearm outer. 1. ragged cut scar between middle and little fingers palm side of hand.

Exhibit 20
LWE
7/20/55

This exhibit is also attached to the original of the transcript, the fingerprint record.

MR. RILEY: Mr. Curtis, on this, what is the birth date as shown by that exhibit of the Defendant, James William Stidham?

A. February 2nd, 1920.

Q. February 2nd, 1920? A. Yes.

Q. And what date was that information taken from him? A. Probably on September 30, 1954.

Q. And how old, after the question of age, what figure appears there? A. 34.

Q. And further on down in that exhibit, what scars or marks is shown on there? A. The word tattoo abbreviated and the word Frances, vertical spelling forearm outer, and that would be on the left arm. Then it says. ragged cut scar between middle and little fingers, [661] palm side of hand. That would be the left hand.

Q. It shows there that he had a ragged cut scar? A. That is right.

Q. Between the middle and the little fingers on the palm side of his left hand? A. Yes, sir.

Q. All right. Now, I will show you this, does the fingerprints of the Defendant James William Stidham's left hand appear on that? A. Yes.

Q. Now, will you show this, do you have to have the fingers extended straight to take the fingerprints? A. That is right.

Q. Now, if my two fingers were like that, and paralyzed like that, could you take the fingerprints of my little and middle fingers?

MR. HENNELLY: Object to the form of the question if Your Honor please.

THE COURT: Sustained.

Q. All right. If Stidham's middle finger, and left finger were paralyzed in a contracted position, could you have taken that fingerprint?

MR. HENNELLY: Object to the form of that question if Your Honor please.

THE COURT: Sustained. He may tell how he took them.

[662] Q. Will you tell how you taken them?

THE COURT: What his condition was.

A. It depends if they were jammed up in a position like that, it would be hard to print it, and it depends on the amount they could be flexed outward.

THE COURT: Wait just a minute, the question was how did you take them?

A. From this print here, it would indicate that they were taken in a normal course of events without difficulty.

MR. HENNELLY: Object to that, and ask that it be stricken and the Jury instructed to disregard it, and a mistrial declared for the reason it was not responsive and a conclusion on the part of the witness.

THE COURT: Sustained, except for the direction of a mistrial. The answer may be stricken, and the Jury is instructed to disregard it.

THE COURT: Mr. Curtis, who do you do, what did you do with Stidham's hand when you took the fingerprints, how were they taken, can you explain to this Jury how

you took the fingerprints, hold out your finger there, your hand, and show them how you did it, with this hand?

A. You just take the one finger individually at a time, and flex it outward and roll it on an ink pad and move it over to the blank fingerprint chart and roll it again. All fingers are taken in the same manner.

[663] THE COURT: And what part of the fingers are put on the ink pad and then placed on the fingerprint pad?

A. The terminal joint of each finger.

Q. Indicate to the Jury what you mean by that. A. The terminal joint.

Q. Of each finger? A. Yes, sir.

THE COURT: All right Mr. Riley, go ahead.

MR. RILEY: Now, you have there on that exhibit the print of all fingers at one time, do you not?

A. No, not all at one time. They are taken simultaneously, not simultaneously, but one following the other.

Q. How do you take these four? A. The four impressions are taken, and then the thumb.

Q. Will you show the Jury how you take this part right here. A. You take them in that position and then the other one afterwards.

THE COURT: Do that again.

A. Four of them taken simultaneously and then the thumb in the next sequence.

Q. Now, I will ask you to hold that up and point to the Jury which part of that represents Mr. Stidham's left hand when the four fingers were taken at the same time. A. The lower left hand corner, the four together, and then [664] the thumb.

Q. Now, could you take those prints together unless the hand was laid out flat?

MR. HENNELLY: Object to the form of that question if Your Honor please.

THE COURT: Sustained, it would be a conclusion of the witness. He may testify and has testified what he did and how it was done.

Q. I will ask you if Stidham's hand was laid out, left hand was laid out flat when you took these fingerprints? A. They were.

Q. That is all.

MR. HENNELLY: No further questions.

THE COURT: Can it be agreed that photostats can be furnished the Reporter for Exhibits E-1, E-2 and E-3, in place of the original exhibits. Those are the exhibits that were identified by this witness.

MR. RILEY: Yes. And State's Exhibit No. 20, and I think the record already shows—

THE COURT: The photostat of Exhibit 20 might likewise be furnished the Reporter. You can then be excused Mr. Curtis.

DR. THOMAS A. HATCOCK,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Hennelly

Q. What is your name please? [665] A. Thomas A. Hatcock.

Q. You are a physician, am I not correct Doctor? A. Yes, sir.

Q. What school or schools are you a graduate of?

MR. RILEY: We will admit the Doctor's qualifications.

THE COURT: All right, they have been admitted.

Q. That is quite all right. Where are you presently stationed? A. U. S. Medical Center, Federal Prison, Springfield, Missouri.

Q. U. S. Medical Center at Springfield, Missouri? A. Yes, sir.

Q. Federal Prison? A. Yes, sir.

Q. Now Doctor, I am going to ask you, excuse me, where are those photostatic exhibits, if you will please, that which has been accepted into evidence as Exhibit E-1, and I will ask you what that is Doctor? A. This is a consultation report in my handwriting, made according to my examination of the Defendant on September 30, 1954.

Q. Now Doctor, I am going to ask you, did you make an examination of this Defendant at that time? A. I did, insofar as his complaints were concerned at that time.

Q. I see. A. My examination was limited to [666] his complaints.

THE COURT: Maybe you had better turn so the Jury can hear you.

A. I examined him, his left arm and hand.

Q. Doctor, let me ask you this, with respect to this particular patient, was he put through the same normal routine that other patients would have been put through down there? A. No, he was not.

Q. He wasn't given the examination, the physical examination which was normally given, is that true? A. That is true.

Q. For the reason that this was a special situation, is that right? A. Yes, sir.

Q. Now Doctor, can you tell His Honor and this Jury what was the date that you made that—at least this limited examination of the Defendant? A. September 30, 1954.

Q. Now, can you tell us what your physical findings were Doctor? A. I think first I should mention the complaints at this time.

Q. Very well. A. At which I was asked to see him.

Q. Go ahead. A. Patient claimed an injury to [667] his left hand as a result of being suspended by a rope tied to his hands with his hands at his back. He com-

plained of weakness of the left ring and little fingers, and inability to forcibly flex and to extend those fingers. My examination revealed some evidence of weakness of these fingers, namely, the ring and little fingers of the left hand. Although there was ability to partially flex and extend these fingers, the function seemed to be weak and the muscles seemed to be weak. The patient also complained of numbness involved in these fingers, not an actual complete loss of sensation, but a numb feeling involving the little and ring fingers. Now, on the basis of these complaints, his story of his injury, and my findings which was based on these subjective symptoms, I felt that possibly he had a contusion of the ulnar nerve which is the nerve that supplies this particular area of the hand and fingers that he complained of.

Q. What was this date again Doctor? A. According to the record, September 30th.

Q. This was 1954, and you actually found yourself some difficulty in flexing those fingers and some weakness, didn't you? A. Well, you have to keep in mind the fact that these symptoms are subjective and are symptoms that may be present without showing external signs of injury, and is based pretty much on the patient's story.

[668] Q. Now, Doctor, independent of a patient's story, if you wanted to determine for yourself, independent of his story, whether or not there had been any actual numbness or any damage to the lower extremity, or to any of those fingers, what would be the way that you would do that? A. Well, it is a very difficult matter, in this particular type of case.

Q. Let me ask you this—

MR. RILEY: Let him answer the question. I would like for the witness to answer.

Q. I am sorry. A. You can have a very serious impairment of this nerve function without having any ex-

ternal evidence of it, that is any serious surface bruises or marks, and to determine whether or not those symptoms are bonafide symptoms, it is a pretty difficult matter. We go through the usual type of sensory palpations and getting the patient's reactions and in this case, he had a disturbance of the sensation in these fingers, which corresponded to the area narrated by this particular patient, and it was very suggestive to use. Now, aside from those findings, except in those cases where this result might be— I mean these findings might be the result of a remote injury, where you would find some slinging of the muscle of these fingers, while as I say, the diagnosis is based pretty much on subjective findings.

[669] Q. Doctor, would you say one of the methods in determining whether or not there is actual damage to the hand under those circumstances, that you would use the pinprick method? A. That is the common one used, commonly used.

Q. And tell His Honor and this Jury how that would be done?

MR. RILEY: Object unless he did it on this patient.

THE COURT: Sustained.

A. As I recall, I don't think I used an actual pin, but I used my hand to produce pinching and to produce a sensation and compared that over this involved area, supposedly involved area, with the normal area.

Q. All right. Now Doctor, I want to ask you, assuming if you will, that a man the age of this Defendant, and the weight of this Defendant, and prior to September 22nd, 1954, had no damage of any kind to his left hand, and assuming that on the 27th day of September, 1954, that he was handcuffed with his hands to his rear and handcuffed by his feet, and that a rope was placed on the handcuffs and that he was then lifted a distance from six to eight inches off of the ground, that he was suspended at first for a period of approximately fifteen minutes, and then

taken down, and assume further Doctor, that he was immediately thereafter put up again for a period of thirty to thirty-five minutes, and assuming further Doctor that there was, that he had pain in that hand, and that there was a shrinking of the ring [670] finger and the little finger—

MR. RILEY: If the Court please, he is including in the question some things which aren't in evidence. I don't recall any evidence of any shrinking.

Q. Withdraw that section then. I think it is in there, but I don't want to take the Court's time, I withdraw that section, and assume further that upon—

THE COURT: Eliminating the shrinking now.

Q. That is right, and assume further that on his admission to the hospital, that there was an absence of flexion and extension in those fingers, as well as anesthesia to pinprick and assume further that at the time you examined him on the 30th, that you still found some evidence of lack of flexion and weakness, I will ask you Doctor, whether or not in your medical opinion, based upon reasonable certainty, medical certainty, the condition you found when you examined him, could have been caused by being lifted in the method and manner that I have described on the 27th day of September, 1954? A. In my opinion, it could have.

Q. Could have been? A. Yes, sir.

Q. Now Doctor, I want to ask you, can you tell His Honor and this Jury just where that ulnar nerve runs, indicating on me on the left? [671] A. The ulnar nerve arises in the spinal cord at the neck level. It is composed of a number of fibers coming out and going in at different levels.

THE COURT: A little louder Doctor.

A. And it takes its course down through the upper arm pretty well under the muscle layers and courses down over the inner part of the elbow, and that point be-

coming rather superficial, and passing through the bony groove, which we all know as the funny bone area, and from there goes into the muscles of the forearm, through the wrist and goes down to the, and supplies the muscular and sensory sensation to the ring and little fingers.

Q. I have no further questions.

Cross-Examination by Mr. Riley

Q. Doctor, this nerve is commonly known as the crazy bone, isn't it, your elbow? A. Well, most people think they are hitting the bone, actually they are hitting this nerve at a superficial area, and they call it the crazy bone.

Q. Now, if your elbow, you can hit your elbow and damage that nerve without having any physical injury, couldn't you? A. That is quite true.

Q. And if you hit your elbow and damage that nerve, why it [672] would cause the loss of flexion in those two fingers, wouldn't it? A. If the injury is severe enough.

Q. Well, what is a contusion? A. Well, commonly called a bruise.

Q. A bruise? A. Yes, sir.

Q. Did you see any bruise on Stidham's left arm? A. I recall seeing no definite bruise on his left arm.

Q. Did you look? A. Yes, sir.

Q. Well then, the information here about his ability to flex it, you got most of that from Stidham himself, didn't you? A. Yes, as I pointed out a moment ago. As I noted in the previous testimony, the diagnosis of nerve injury in this Defendant, is dependent upon subjective findings.

Q. And then what is subjective findings? A. Symptoms that the patient complains of himself.

Q. And not something that you can see? A. Can't always be tied in with the objective evidence. In other words, the findings on physical examination.

Q. If you saw a contusion or a bruise, that would be an objective findings, wouldn't it? A. Yes, sir.

Q. And subjective symptoms are what the patient tells you [673] and not what you see? A. That is true.

Q. Now, your opinion in this case is based upon subjective findings, isn't it? A. To a great extent.

Q. You found no injury whatsoever? A. No signs of any bruises as I recall, or I have no notation of any in the original notes made at the time.

Q. You didn't make any notation of the scar or large cut? A. No, sir, I was aware of that. I recall it. I didn't make any notation of it. In my opinion, it played no part in the man's symptoms at the time.

Q. You didn't prescribe any treatment whatsoever? A. No, sir, I felt that it was probably a minor contusion and didn't call for any specific treatment and would probably clear up in passage of time.

Q. That is all.

Redirect Examination by Mr. Hennelly

Q. Doctor, is a pinprick examination to determine if ther is lack of anesthesia, would you say that is subjective matter or an objective matter? A. Well, your conclusions are based on the patient's reply to the type of sensation that he gets from it.

Q. If you are standing there watching him and you apply the [674] pinprick method, either to the lower extremity in a leg or hand, and there is no twitching or no reaction of any kind, would you say that that was an objective finding on the part of the physician? A. Yes.

Q. No further questions.

Recross-Examination by Mr. Riley

Q. You didn't use the pinprick? A. No.

Q. That is all.

Redirect Examination by Mr. Hennelly

Q. It was done when he entered by one of your other men, wasn't it Doctor?

THE COURT: If the Doctor knows.

A. I don't know.

MR. HENNELLY: Very well. I guess the record would speak for itself. That is good enough. Thank you very much. With that, the Defense rests Your Honor.

THE COURT: We will recess Gentlemen of the Jury, for the noon hour. There will probably be some additional testimony I understand from counsel, but it won't be very long and then the Court has to prepare the instructions in the case, and then there will be the argument of counsel, and so the case [675] should be submitted to you shortly after you return from your noon recess. During the noon recess, remember the previous instructions of the Court, the instructions the Court has given to you about not becoming separated from each other, or allowing anyone to talk to you about the case, or permitting anyone to talk to you about it. I will ask that the Sheriff take charge of the Jury then, and during the noon recess don't get separated and Mr. Sheriff return them to the Court Room and the Court will be in recess until One O'clock.

And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 429) Wednesday, July 20th, 1955, Regular July 1955 Term

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Now at this time, it is ordered by the Court that this cause be recessed for the Noon Recess. Now Noon Recess being over, trial in this cause is resumed and progresses in the hearing of the evidence to the conclusion thereof.

BEN MARKWAY,

BEING SWORN, TESTIFIED:

Direct Examination by Mr. Riley

Q. State your name please. A. Ben Markway.

Q. Mr. Markway, what position do you hold? [676] A. Sheriff of Cole County.

Q. And that is in Jefferson City? A. That is right.

Q. Mr. Markway, I will show you what has been marked as Exhibit G. You just keep it there, is that your signature on there? A. Yes, it is.

Q. Now, will you hold it up and show the Jury just where your signature appears? A. Right here, the third line.

Q. All right. Now Mr. Markway, are you a medical doctor? A. No, I am not.

Q. Have you ever had—

MR. HENNELLY: I am going to object to any further testimony on the part of this witness, for the reason that it is improper rebuttal evidence in chief, but since this evidence came in without objection, I don't see how it becomes the basis for any rebuttal testimony.

THE COURT: These exhibits weren't brought into the case until after the evidence in chief.

MR. RILEY: You brought them in.

THE COURT: They came up first upon the exhibit that you offered, and then the one that was offered immediately, or at the same time, or about the same time by the State. The objection will be overruled.

[677] Q. Now Mr. Markway, did you know Walter Lee Donnell? A. I do not know him, no, sir.

Q. Had you ever seen him? A. Not that I know of, until the night of, down at the Funeral Home.

Q. Where did you see his body? A. Well, I will take that back, I did see him, they said that was him out at the Penitentiary that night.

MR. HENNELLY: Object to that, that will be hearsay and a conclusion on the part of the witness.

THE COURT: Sustained.

Q. Where did you see the body? A. The body?

Q. Yes. A. Down at the Dulle Funeral Home.

Q. Did you examine the body? A. I did.

Q. And what examination did you make? A. I just examined it.

Q. Speak up loud. A. I examined his chest and his body. They had it covered and took the cover off and I examined his body and then they pulled him over on his side and let me look at his back.

Q. Did you notice any wounds on his body? A. Yes, sir, I did.

[678] Q. What condition were the wounds at the time you examined him?

MR. HENNELLY: Now, I am going to object for the reason that this again is improper rebuttal and certainly it is within the Court's discretion with respect to what rebuttal testimony will be introduced, but this is apparently an attempt to vary the terms of a written instrument, one that was offered in evidence, and received in evidence without objection, and I submit it is improper argument and if anything, it is evidence in chief.

THE COURT: Overruled, for the reason stated.

MR. HENNELLY: Very well.

Q. What condition were the wounds in when you examined him? A. When I examined the wounds, they were stitched back, they had stitches through them, and they were stabs or whatever you want to call them, in different places.

Q. Were they sewed up? A. They were.

Q. Now, did you make any further examination of the wounds, probing them or sticking an instrument in them? A. No, sir.

Q. Now Mr. Markway, I will ask you to look at this exhibit regarding this part up at the top there, that typewritten part, did you put that in there? A. No, I did not.

[679] Q. Did you ever type in anybody's name in that certificate? A. No, I did not. The only thing that was on there was, I wrote by longhand myself.

Q. Was that typewritten in there when that certificate was signed? A. No, it was not.

Q. Who put it in? A. Well, I am not positive, Mr. Dulle told me—

MR. HENNELLY: Object to that, that would be hearsay and a conclusion.

Q. If you don't know, say you don't know. A. I don't know.

Q. Now, were you at the Penitentiary when the other bodies were removed? A. I think I was. I was out at the Penitentiary, but I didn't see them being removed. I was there when the ambulances came, that is, in and out, and I went down and told them that the ambulances were there, but I didn't see them that I can recall, taking the bodies out.

Q. When was the first time you saw this Death Certificate as it is filled in now? A. The first time I saw it, I expect was a week ago today down at Union.

Q. That is all. A. Today a week.

[680] MR. HENNELLY: Now, under those circumstances, I ask that all that testimony be stricken for the reason it is totally irrelevant, immaterial and further for the reason that it is improper rebuttal testimony.

THE COURT: Overruled.

Cross-Examination by Mr. Hennelly

Q. Sheriff, how long have you been Sheriff of Cole County? A. Six and a half years.

Q. In the course of that time Sheriff, have you had reason and opportunity to see people who suffered from gunshot wounds? A. What is that?

Q. Have you seen people who suffered from gunshot wounds? A. Have I ever seen some committed?

Q. No. Have you seen people who suffered from gunshot wounds? A. I have seen some who committed suicide.

Q. You have seen some people that have been shot by themselves or by somebody else then? A. I have.

Q. Is that right? A. Yes, I have.

Q. And about how many people would you say that you have seen? A. That have been shot?

Q. Yes. A. That would be a little hard for [681] me, you mean shot and committed suicide?

Q. Either way, both. A. By themselves?

THE COURT: Shot, regardless of how they were shot or who they were shot by.

A. That would be a little hard to say, I would say fifteen or twenty.

MR. HENNELLY: Fifteen or twenty?

A. Yes, sir.

Q. Now then, this Official Death Certificate states that the cause of disease or condition directly leading to the death was by bullet wounds of a gun in unknown hands. Now, is it your testimony that you did not put that in there? A. No, I put this in there.

Q. You put that in there, is that right? A. Yes, sir.

Q. So that you sent to be put in the official record of the State of Missouri, a statement that the body of Walter Lee Donnell, that he had died as a result of bullet wounds in the hands of persons unknown, is that correct?

A. That is right.

Q. And is this your signature on both, Ben S. Markway? A. Yes, sir.

Q. And this next section, removal to National Cemetery at Nashville, Tennessee, is that your signature? [682] A. I don't think that is.

Q. When you stated that, when you signed this, that there was something that was left blank, what was that? A. All the typewritten in there, but Dulle said they—

Q. Object to this section as not being responsive and being hearsay.

THE COURT: Sustained. He just asked you what part you didn't put in there.

Q. What part—strike that. What was on there when you signed that Sheriff, this Certificate? A. Well, all this fine print was on there, and that is all, and when I signed it, that other was put in later.

Q. Everything was put in later? In other words, you tell this Court and Jury that what you did, was you signed a Death Certificate in blank, is that right? A. Except that what I wrote on there.

Q. Well, you, the only thing you put down was bullet wounds, is that right? A. That is right.

Q. And did you go and change this matter later on? A. I didn't get that.

Q. Have you ever changed this certificate? A. Yes, sir.

Q. And when did you change it? A. I changed it I think last Friday, Thursday or Friday after [683] I came back from Union.

Q. And was that at the direction of anyone in Cole County? A. I asked Mr. Riley if it would be a good thing for me to do that, and he said yes it would.

Q. Be a good thing for you to do that? A. Yes, sir.
Q. That is all.

Redirect Examination by Mr. Riley

Q. You don't know whose body it was that this death certificate was used on, do you, did you know that this was Donnell's body? A. No, I did not.

MR. HENNELLY: Object to the leading and suggestive question.

THE COURT: Overruled.

Q. That is all.

THE COURT: Just one moment, let me see those just a moment. That is all.

CLARENCE DIETZEL,

BEING RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Mr. Dietzel, going back to the night of September 22nd, and the early morning hours and the morning hours of September 23rd, where were you, in what hall? A. I was in B Hall.

[684] Q. Now, is that above B basement? A. It is.

Q. I will ask you if you saw the defendant Stidham in B Hall that morning?

MR. HENNELLY: Object to that for the reason that this is a matter which has already been covered in the matter in chief. This witness already testified to it, and not proper rebuttal, and accumulative.

THE COURT: Just one moment.

MR. HENNELLY: Very well Your Honor.

THE COURT: On cross-examination, he testified that he saw him the next morning in B Hall. I don't recall that this is in evidence about the evening, this is the night you are referring to, the night of September 22nd?

MR. RILEY: Yes.

THE COURT: The objection will be overruled. He may inquire, because there has been some testimony by the Defendant as to where he spent the night.

Q. I will ask you if you saw the Defendant Stidham in B Hall? A. I did.

Q. During that night? A. I did.

Q. You know about what time it was? A. It was toward morning, toward daylight. It would have to [685] be a guess, exactly I couldn't state, it was between three and five o'clock, or about that time.

Q. Where were you? A. I was on the top walk on the south side of B Hall.

Q. Were you in a cell or out on a walk? A. I was in a cell.

Q. Who was with you? A. Noble was sitting in the door, beside of the door, and I was, they had me laying on a bed or a cot and there was several more inmates there, I don't know their names.

MR. HENNELLY: Object to this, this is not proper rebuttal, and it was specifically covered in the direct examination of this witness, and also in his cross-examination.

THE COURT: The witness has testified to some of these matters on direct examination is my recollection.

MR. RILEY: This witness never testified after they came upstairs.

THE COURT: All right, overruled, go ahead.

Q. Now, where did you see Stidham? A. In the cell that I was laying in, on top, the top walk of B Hall.

Q. Is that while you were with Noble? A. Yes.

Q. Did you see Stidham? A. He was in the cell, yes, he sat on my leg.

[686] Q. Did you see him? A. Yes, sir.

Q. Recognize him? A. Yes, sir.

Q. Did you talk to him? A. Yes, sir.
Q. Or did he talk to you? A. Yes.
Q. That is all.

Recross-Examination by Mr Hennelly

Q. Now Mr. Dietzel, when was this that you saw him? A. The morning of the 23rd after the evening of the 22nd.

Q. And what time of the morning was it? A. It was toward daylight, about, I couldn't give you the exact time.

Q. Was this after all of the Missouri State Highway Patrol had come in and everything? A. Yes, they were outside, because I heard them.

Q. Had they been inside of B basement or inside anyplace in B Hall by that time? A. I don't know.

Q. You don't know? A. No, I don't know.

Q. No further questions Mr. Dietzel.

MR. RILEY: That is all.

[687] LIEUTENANT W. S. BARTON,

BEING RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Lieutenant Barton, I will ask you if you were up in B Hall during the night or early morning of September 23rd? A. Yes, sir, I was.

Q. Did you see the Defendant Stidham there? A. I did.

Q. Who was he with? A. He was with Hoover, Laster and DeLapp.

Q. What did you have with you when you went up there? A. Had a public address system.

Q. Did you have a conversation with any of the four that you have named? A. Yes.

Q. Without saying what you did? A. Yes.

Q. Who did you talk to? A. Talked to DeLapp.

Q. Now, where was Stidham in relation to the other three that you have named? A. Stidham was standing with the group.

Q. Who is the group? A. Well, that was Hoover, Laster, DeLapp and Stidham, the four of them.

Q. All right. Now then, what did they do while they was standing [688] in this group? A. While they was standing in this group, DeLapp came over to the lobby.

Q. Now, how far were they from you? A. Oh, they wasn't very far, I would say fifteen or twenty feet probably.

Q. All right. About what time was that? A. About three A.M.

Q. You say you had this public address system? A. We did.

Q. Was it used? A. It was by DeLapp.

Q. Was Stidham present when it was used? A. Standing on the flag just off of the lobby there about fifteen feet away.

Q. After DeLapp used this, where did DeLapp go? A. He went back to the group, went back on the B side.

Q. Went back to what group? A. To Laster and Stidham and Hoover.

MR. HENNELLY: Object to that section with respect to back to the group Your Honor, for the reason that that is a conclusion and an invasion of the province of the Jury, and the proper foundation has not been laid for such a statement Your Honor.

THE COURT: Overruled. He has named who he meant by the group. [689] Overruled.

Q. Now, what time was this Lieutenant? A. About three A.M.

Q. What date? A. On the morning of the 23rd.

Q. All right. Now Lieutenant, did you, were you present in the classification room on the occasion when Stidham was questioned? A. I was.

Q. What time was that? A. About eight A.M., eight P.M., rather, on the evening of the 23rd.

Q. Who was present? A. Sergeant Nash, Sergeant Barkley and Chaff of the Police Department, Sergeant Inman and I believe there could have been some more, but I do not know those.

Q. Were there fifteen officers in there? A. No, sir.

Q. Were you ever in that room with the Defendant Stidham and questioning him at three o'clock in the morning? A. Never was.

Q. How long was he in that room? A. Couldn't have been in there over fifteen or twenty minutes at the most.

Q. Do you know Olin Curtis? [690] A. I do.

Q. Is he with the Highway Patrol? A. He is.

Q. And what is his rank? A. He is a Sergeant.

Q. Where does he work? A. He works in the office out of Troop A, at Lee's Summit.

Q. Is he a desk Sergeant at Lee's Summit? A. Yes, sir.

Q. Where is Lee's Summit with respect to Kansas City? A. About twelve miles east and south of Kansas City on Highway 50.

Q. Were you in charge of the detail of the Highway Patrol in the Missouri State Penitentiary? A. I was.

Q. Was Sergeant Olin Curtis, of the Missouri State Highway Patrol in the Missouri State Penitentiary? A. No, sir, never was there.

Q. Do you know him personally? A. I do.

Q. That is all.

Recross-Examination by Mr. Hennelly

Q. Lieutenant, where are you stationed? A. Kirkwood.

[691] Q. You are stationed in Kirkwood, that is quite some distance from the Penitentiary also, isn't it? A. Yes, sir.

Q. Now Lieutenant, I am going to ask you if I didn't specifically ask you when you were testifying before, the next time you saw—the first time that you saw Stidham after you had gotten to the Penitentiary that night, you recall me asking you that? A. No, I don't recall that.

Q. Let me ask you if it isn't a fact that you told me that the first time that you saw him was when he was out, that it was the next morning? A. No.

Q. You didn't? A. That would have been the morning, that would have been about three A.M. I saw him at three A.M. and I saw him at the time we took B and C Hall.

Q. Now, had you ever seen Stidham before in your life? A. No.

Q. That was the first time you ever saw him? A. That is right.

Q. And how many men were up there at that time Lieutenant? A. What do you mean, men?

Q. How many men were there when this situation was going on? [692] A. You mean in the group, you mean inmates?

Q. Yes. A. I don't know.

Q. Were there a hundred of them? A. Yes, there were several hundred in there.

Q. You had never seen Stidham in your life, but you tell us today that you recall now having seen Stidham in the group of several hundred, is that right? A. I didn't say several hundred.

Q. How many were up there at that time? A. I said in this group of four.

Q. When I asked you with respect to the number that were there, didn't you indicate several hundred? A. You wanted to know how many was in that area.

Q. Yes, that is what I wanted to know. A. That covered the entire cell block at that time.

Q. Now, what cell block was that? A. B.

Q. Sir? A. B.

Q. That isn't shown on State's Exhibit 1, is it Lieutenant? A. No.

Q. Is that the place above State's Exhibit 1? A. That is right.

Q. Would that be the first floor above it? A. That is right.

[693] Q. And in this, in this particular section that you refer to, were these men all in cells or were they in the lobby, or where were they?

THE COURT: Which men are you talking about now?

Q. The two hundred men. A. I didn't say there was two hundred. I said there were several. I didn't count them. I don't know. I didn't have any idea.

Q. Did you at anytime since I have been questioning you mention two hundred men? A. I don't recall that.

Q. You don't recall that? A. No.

Q. Now, let me ask you this, when you were upstairs in B Hall Lieutenant, how many men were up there altogether? A. I don't know.

Q. Would you say now that there were as many as two hundred? A. It would only be a guess.

Q. Well, would you say there was that many? A. Yes, I would say there would be that many.

Q. And those two hundred men were confined in how big an area? A. They had the entire cell block.

Q. When you say a cell block now, would that be any bigger [694] than the front section of this Court Room? A. Oh, yes.

Q. Would it be any bigger than the entire Court Room? A. Yes.

Q. Would you tell us how big that section would be? A. I don't know how to describe the cell block to you in size. I could give you the approximate feet probably.

Q. Please. A. I would judge that the cell block would be about seventy-five feet wide and a hundred feet long or better.

Q. Seventy-five feet wide and a hundred feet long?

THE COURT: Seventy-five feet wide and a hundred feet long or better.

Q. Very well. Was that, was there some furniture in that place also, in that cell block? A. No, it was all thrown down in the door.

Q. Was there anything up there except those two hundred men? A. What do you mean, any steps?

Q. Was there any furniture up there at all besides that? A. Not that I recall, it was all piled up down in front of the door.

Q. And what was the closest distance that any men were to this position that you saw Stidham? A. Oh, they were in the same general area, but in that one group [695] there right off the door, there wasn't anybody in there.

Q. And you had never seen Stidham before in your life, but today you remember that he was there, is that right? A. I never will forget him.

Q. All right. You hadn't seen him before though, had you Lieutenant? A. No. He was very distinct, his features stood out quite well.

Q. I am going to ask you Lieutenant, the last time that we started this case in this Court Room, do you recall

my questioning you with respect to whether or not you knew a Sergeant Olin Curtis, you remember me asking you that at that time, if you knew him? A. I don't think you did. If you did, I could have told you that I did, because I knew him quite well.

Q. Well—

THE COURT: Just a minute—when are you talking about?

Q. I am talking about the first time the case was tried Your Honor.

THE COURT: All right, go ahead.

Q. Would you say you didn't tell the Court and Jury at that time that you didn't know Olin Curtis, didn't know who he was? A. I know I didn't tell the Jury that.

Q. You didn't tell us that? [696] A. No, sir.

Q. Now, with respect to this time that you were in a room in which the Defendant was questioned, I believe that you indicated that that was in the classification room, is that right? A. Yes, sir.

Q. And what officers do you recall being there? A. Sergeant Inman, Barkley, Sergeant Nash, Sergeant Chaff of the St. Louis Police Department, and myself. There could have been another officer or two, but I don't recall them. I do know those people were there.

Q. Could there have been as many as five more there? A. No.

Q. Couldn't have been? A. No.

Q. There was at least five that you know of though? A. The ones that I have named.

Q. Now, was the Defendant questioned at that time with respect to this crime? A. Yes, sir, to a certain extent, not much.

Q. No further questions.

MR. RILEY: That is all.

[697] OFFICER BILLINGS,

BEING RECALLED, TESTIFIED:

Redirect Examination by Mr. Riley

Q. Officer Billings, you have been sworn in this case? A. Yes, sir.

THE COURT: Yes, previously sworn.

Q. I will ask you if you recognize State's Exhibit No. 17? A. Yes, I do.

Q. Is your photograph shown there? A. Yes, sir.

Q. And do you know where that place is? A. That is in the Court Room at the Cole County, Jefferson City Court House.

Q. And you know what day that was taken on? A. That was on the 29th of September.

Q. What year? A. 1954.

Q. Do you recall, or do you know what day Stidham and the others were taken to Springfield? A. On the 29th.

Q. Was that photograph taken before they went to Springfield? A. About twenty minutes before they left.

Q. And do you see Stidham in the photograph? A. Yes, sir, standing next to me.

Q. At this time Your Honor, we offer State's Exhibit No. 17, and with the Court's permission to cut that part of it off.

[698] THE COURT: You offer to cut that part of it off which shows the others, now this is outside of the hearing of the Jury Mr. Ehlers, and let the record so show. By others, you mean the other Defendants charged with this Defendant?

MR. RILEY: Yes, those are the co-defendants, those that have on the prison attire.

THE COURT: Now, you propose to leave the other half in there?

MR. RILEY: Yes, this half here, just the part that is showing the Defendant.

MR. HENNELLY: The Defendant will object to it for the reason that it is hearsay and not proper rebuttal, doesn't tend to prove or disprove any evidence in the case. If anything, it is evidence in chief, and the proper foundation has not been laid for its introduction, and for the reason that it contains certain other matters of hearsay, and to introduce it under these circumstances would only bias and prejudice the rights of this Defendant, and take away from him certain of his Constitutional Rights.

THE COURT: All right, get your scissors. I want the Reporter to mark on the back of the part that is cut off, Exhibit 17-1. Now then, the objection—the record may show the objection is overruled and Exhibit 17 less Exhibit 17-1 that has been cut off, has been received in evidence, and the part cut off is not received in evidence, and it can be [699] handed to the Jury.

Exhibit 17, having been received in evidence, being a photograph, is attached to the original of this transcript.

Q. Officer, for the identification for the Jury, will you point out to the Jury where you are on that photograph, hold that photograph up.

A. Right here.

Q. The uniformed officer there? A. Yes.

Q. And who is the next man there? A. To my right is Stidham.

Q. You are standing to Stidham's left? A. Yes, sir.

Q. That is Stidham's left hand shown there in the photograph? A. Yes, sir.

Q. That is all.

Recross-Examination by Mr. Hennelly

Q. Officer Billings, were you present when there were some pictures taken of the Defendant and other convicts, when they were going down to Springfield on a bus? A. Yes, sir.

Q. Have you seen that picture anyplace? A. No.

Q. Did you ever see a copy of that picture in the course of [700] this investigation? A. No, sir.

Q. You don't have a copy of it, do you? A. No.

Q. Do you know where we could get a copy of that picture? A. I may have one if you want to go to my house and see.

Q. I have no further questions.

Redirect Examination by Mr. Riley

Q. Mr. Billings, the picture you are speaking of is the one you saw in the newspaper? A. Yes, sir.

Q. They aren't photographs that we took, are they? A. No, sir, that was in the Jefferson City paper.

Q. That is all.

MR. RILEY: State rests.

MR. HENNELLY: I want to renew the two motions that I previously made at the close of all the evidence, the Defendant's Motion, the Motion to the Court to instruct the Jury to return a special judgment of acquittal. And at the close of all the evidence, the Defendant moves the Court to instruct the Jury to return a judgment of acquittal.

THE COURT: Overruled.

And thereafter towit: On the same day, the following order was entered of record:

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[701] Circuit Court Record, Butler County, Missouri (Book 62, page 429) Wednesday, July 20th, 1955, Regular July 1955 Term

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Now comes the defendant by counsel, and renews two Motions for Reduction of Charge and for Acquittal,

at the close of the whole case, which are refused and overruled by the Court. Defendant objects and excepts and continues to object and except to the rulings of the Court.

MR. HENNELLY: The Defendant objects to Instruction No. 3 for the reason that it is too vague, indefinite and speculative, and it is a comment on the evidence, and it is incomplete and inaccurate statement of the law, and does not purport to instruct on all of the law relative to the law on circumstantial evidence. The last sentence of this instruction beginning with, "Crime may be proven by circumstantial evidence", does not with sufficient particularity indicate whether or not the Court is referring to direct evidence or to circumstantial evidence. The Defendant objects to Instruction No. 4, for the reason that it is a comment on the evidence, that it does not sufficiently and accurately describe and define the terms "Felonious, wilfully, deliberately, premeditatedly and malice and malice aforethought". The Defendant further objects to this instruction for the reason that there has been no evidence [702] in this case tying the Defendant in with any of the persons mentioned, either Rollie Laster, Hoover, Edward Kenton, and Jackie Lee Noble and John William DeLapp, or Joseph Vidauri, and for the further reason that it is too vague, indefinite, and speculative, and gives the Jury a roving commission, and in fact ties them down to a verdict of guilty. The Defendant further objects for the reason that the instruction does not indicate that if the Defendant did not conspire with all of these Defendants previously mentioned, that then the Defendant should be acquitted and for the further reason that it does not define with sufficient particularity the crime of murder in the first degree. The Defendant objects to Instruction No. 5 for the reason that it is incomplete, inaccurate, indefinite statement, is not a complete

statement of the law and a comment on the evidence. The same objection for No. 6, and add this to No. 6. The Defendant further objects to Instruction No. 6 for the reason that it is a shift of the burden of proof and does not make any reference to the fact that the Jury has to be satisfied beyond a reasonable doubt as to whether or not this statement was voluntary. The Defendant further objects to this instruction with particular emphasis on the last section beginning with the statement, "The Jury must consider such statement and you should give it such weight as you believe it deserves in arriving at your verdict.", for the reason that [703] that is a comment on the evidence, and is a direction to the Jury, not warranted by the evidence, and in effect invalidates the rest of the instruction. The Defendant objects to Instruction No. 7 for the reason that that is a comment on the evidence with emphasis and points up to the fact that this Defendant has been previously convicted and this is particularly important in the light of the fact that two other witnesses for the State have been previously convicted of crimes and that the instruction fails to make any reference to their previous convictions. The Defendant objects to Instruction No. 8 for the reason that it is inaccurate, insufficient statement of the law and does not purport to instruct in all of the law relative thereto, and is a comment on the evidence.

THE COURT: As to Instruction No. 7, previous convictions—

MR. HENNELLY: The Defendant will specifically move the Court and request the Court not to give Instruction No. 7 with respect to the previous convictions of the Defendant.

THE COURT: And does not request it?

MR. HENNELLY: And does not request it, and under those circumstances—

THE COURT: Then the record may show Instruction No. 7 will be withdrawn and not given, and I will mark it refused.

MR. HENNELLY: All right Judge.

THE COURT: I mean mark it withdrawn.

[704] MR. RILEY: At the request of the Defendant.

MR. HENNELLY: Yes, that is all right.

INSTRUCTIONS GIVEN

Instruction No. 1

The State of Missouri, by the Indictment in this case, charges the defendant with a criminal offense against the laws of the State of Missouri. He pleads not guilty, thereby raising an issue of fact between the State of Missouri and himself, which you, the jury, are to determine from all the facts and circumstances in the case.

It is the duty of the Court to instruct you on all questions of law arising in this case, and it is your duty to receive such instructions as the law of the case, and to find the defendant guilty or not guilty, according to the law as declared by the Court and the evidence as you have received it under the direction of the Court.

Given
7-20-55
R.H.W.

Instruction No. 2

The Indictment contains the mere formal statement of the charge, but it is not to be taken as any evidence of defendant's guilt.

The law presumes the defendant to be innocent, and this [705] presumption continues until it has been overcome by evidence which establishes his guilt to your satis-

faction and beyond a reasonable doubt; and the burden of proving his guilt rests with the State.

If, however, this presumption has been overcome by the evidence and the guilt of the defendant established beyond a reasonable doubt, your duty is to convict.

If, upon consideration of all the evidence, you have a reasonable doubt of the defendant's guilt, you should acquit; but a doubt to authorize an acquittal on that ground ought to be a substantial doubt touching the defendant's guilt, and not a mere possibility of his innocence.

Given
7-20-55
R.H.W.

Instruction No. 3

The Court instructs the jury that evidence is of two kinds, direct and circumstantial. Direct evidence is when a witness testifies directly of his own knowledge of the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances in a certain case, from which the jury may infer other and connected facts which usually and reasonably follow, according to the common experience of mankind. Crime may be proven by circumstantial evidence, as well as by direct testimony of eye witnesses, [706] but the facts and circumstances in evidence should be consistent with each other, and consistent with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence.

Given
7-20-55
R.H.W.

Instruction No. 4

"Felonious" means wickedly and against the admonition of the law.

"Wilfully" as used in these instructions, means intentionally, not accidentally.

"Deliberately" means considered and reflected upon. An act committed in the cool state of the blood, with a conscious purpose to kill, and not under the influence of a violent passion suddenly aroused by some lawful or just cause of provocation, is committed deliberately.

"Premeditatedly" means thought of beforehand for any length of time, however short the time.

"Malice", in its legal sense, and as used in these instructions, does not mean mere spite, ill will, hatred or dislike, as it is ordinarily understood, but it means that condition of the mind which prompts a person intentionally to take the life of another without just cause, justification or excuse, and signifies a state of disposition that shows a [707] heart regardless of social duty and fatally bent on mischief.

"Malice aforethought" means malice with premeditation.

Bearing in mind these definitions and those included in the other instructions, the court instructs the jury that if you believe and find from the evidence, beyond a reasonable doubt, that Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph M. Vidauri entered into a conspiracy and agreement to act in concert and together to kill and murder Walter Lee Donnell at the time and place and in the manner by the means hereafter set forth in this instruction, and if you believe and find from the evidence, beyond a

reasonable doubt, that pursuant to such a conspiracy and agreement those aforesaid persons, acting in concert and together, on September 22, 1954, in Cole County, Missouri, wilfully, deliberately, premeditatedly, and with malice aforethought did make an assault upon Walter Lee Donnell, and then and there did wilfully, deliberately, premeditatedly, and with malice aforethought forcibly strike hit, stab, cut, and beat Walter Lee Donnell in and upon his face, head, and body, with a sledge hammer, and a knife, and another sharp instrument or dagger, if you so find, thereby giving Walter Lee Donnell about his face, head, and body, mortal wounds from the effects of which he died on September 22, 1954, if you so find, and if you further believe and find from the evidence, [708] and beyond a reasonable doubt, that the defendant, James William Stidham, at the time of such killing and murdering, was a member of the conspiracy and agreement aforesaid and theretofore had conspired and agreed with Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph M. Vidauri, to aid, abet, assist or encourage them in the killing and murdering of Walter Lee Donnell at the time and place and in the manner and by the means aforesaid, and if you further believe and find from the evidence, beyond a reasonable doubt, that the defendant, James William Stidham, pursuant to such conspiracy and agreement, was actually present during the killing and murdering aforesaid of Walter Lee Donnell, and that he knew of the felonious purpose and intent of Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph Vidauri to kill and murder Walter Lee Donnell as aforesaid, and that James William Stidham then and there knowingly and intentionally aided, abetted, assisted, or encouraged the aforesaid persons, or any of them, in the aforesaid killing and murdering, then you should

find the defendant, James William Stidham, guilty of Murder in the First Degree and by your verdict so say.

And unless you do so find the facts to be in every respect as above stated, you must find the defendant, James William Stidham, not guilty and by your verdict so say.

[709] If you find the defendant, James William Stidham, guilty of Murder in the First Degree, you will assess his punishment at death or at imprisonment in the state Penitentiary during his natural life.

Given
7-20-55
R.H.W.

Instruction No. 5

The Court instructs the jury that, if you believe and find from the evidence, beyond a reasonable doubt, that the defendant, James William Stidham, and William R. Hoover, Rollie Laster, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp and Joseph M. Vidauri entered into a conspiracy and agreement to act in concert and together to kill and murder Walter Lee Donnell at the time and place and in the manner and by the means set forth in Instruction No. 4, then the act of either of them pursuant to such conspiracy and agreement to kill and murder Walter Lee Donnell would be in law the act of each one so conspiring and agreeing.

The word "Conspiracy", as used in these instructions, means a common agreement and understanding between two or more persons which is formed for the purpose of committing and doing by their joint efforts some criminal act.

The Court instructs the jury that all persons are principals who are guilty of acting in concert and together [710] in the commission of a crime. When a crime is ac-

tually committed by one or more persons and another person is actually present, and, knowing of the felonious purpose and intent of the person or persons committing the crime, he knowingly and intentionally aids, abets, assists or encourages the person or persons actually committing the crime in the commission of the same, then such person so knowingly and intentionally aiding, abetting, assisting or encouraging the person or persons actually committing the crime in the commission of the same is a principal and he is equally guilty with the person or persons who actually commits the crime.

However, you are further instructed that the mere presence of a person at the time and place of the commission of a crime by another or others is not alone sufficient to justify finding him in any manner responsible for the commission of such crime. On the contrary, before such person can be found in any manner responsible for the commission of such crime, the evidence in the case must show, beyond a reasonable doubt, not only that such person was actually present at the commission of such crime, but also that such person knew of the felonious purpose and intent on the part of the person or persons actually committing the crime, and that he then and there was knowingly and intentionally aiding, abetting, assisting or encouraging the person or persons [711] committing the crime in the commission of the same.

Given
7-20-55
R.H.W.

Instruction No. 6

The Court instructs the jury that before any alleged statement can be valid, and before you can even consider it, it must have been made voluntarily, that is to say, without anyone having offered to the person who is claimed to

have made such a statement any hope of leniency or reward of any kind for making such statement, and without anyone making any threat or doing any violence to the person claimed to have made any such statement in order to induce or force him to confess.

If the jury does not believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury should entirely disregard such statement in arriving at your verdict.

If, however, the jury does believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury must consider such statement and you should give it such weight as you believe it deserves in arriving at your verdict.

Given
7-20-55
R.H.W.

[712] Instruction No. 8

The Court instructs the jury that you are the sole judges of the credibility of the witnesses, and of the weight and value to be given to their testimony.

In determining the credit you will give to a witness, and the weight and value you will attach to his testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial; the motives actuating the witness in testifying, if any, his relation to or feelings for or against the defendant or the State, if any, the probability or improbability of his statements, the opportunity he had to observe and to be informed as to the matters

respecting which he gives testimony, and his inclination to speak truthfully or otherwise as to the matters within his knowledge. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit and to his testimony such weight and value as you deem proper.

Given
7-20-55
R.H.W.

Instruction No. 9

In this case it is essential to a verdict that the entire jury of twelve agree upon any verdict the jury may [713] render. Your verdict when so agreed upon must be written on a separate sheet of paper, and not upon any of these instructions, and must be signed by the Foreman of the jury.

Given
7-20-55
R.H.W.

INSTRUCTIONS WITHDRAWN

Instruction No. 7

The Court instructs the jury that any evidence that the defendant may have been previously convicted of an offense against the laws of the State of Missouri is not evidence on any issue in this case, except insofar as you may find such evidence of prior conviction may tend to bear upon the credibility of the defendant, and the jury should consider such evidence only insofar as it may in the opinion of the jury tend to bear upon the credibility of the de-

fendant, and the jury will consider it for no other purpose in this case.

Withdrawn at request
of Defendant.
7-20-55
R.H.W.

The above instructions were read to the Jury by the Court.

MR. REX HENSON: If the Court please—

THE COURT: Mr. Henson.

MR. HENSON: Gentlemen of the Jury, as the Court has stated [714] to you, the proceedings in a case of this type or any criminal case for that matter, is for the State to make an opening argument. The defense counsel will make his argument and then for the State to close with a rebuttal, which in this instance will be presented by the Prosecuting Attorney of Cole County, Mr. Riley. I know you gentlemen have suffered through nearly three days of heat and lots of testimony here and for that reason, we will be as brief as possible, and I will try not to take too much of your time. I feel in this case that I am in a peculiar situation, because I am much in the same position as the members of the Jury Panel are. As this testimony came to you from the witness stand and you heard it for the first time, I also heard it for the first time, because I was not into this case until it came into this County, and I came in to assist Mr. Riley, which is my duty as Prosecuting Attorney of this County. So as I discuss this case with you, and the evidence as it came to you from the stand, I will be discussing a lot of it, practically all of it, from the same standpoint as you heard it, because I heard it only one time. I would like to point this out at the beginning. During the time that you heard this testimony, and there has been a lot of it, I had to sit there and listen

to it too, and try to keep notes on it, and there may be times, as I discuss this testimony with you, that I might misquote or misrepresent some [715] of it, and I want you to understand at this time that it will be merely an oversight and will not be done intentionally. This man Stidham is charged in the indictment by the Cole County Grand Jury with Murder in the First Degree. That is the only charge against him, and the only one you will consider in this case as to whether he is guilty of Murder in the First Degree, or whether he is not guilty, according to the instructions given to you by the Court as you apply the evidence as it came from the stand to that law. The State feels, and I feel personally that everything has been done both for the State and for the Defendant, through his attorney, Mr. Hennelly, that could be done in a case of this type, and that all of the evidence that could be brought to you on both sides, has been brought and presented to you in the best manner that it could be presented. I believe Mr. Riley and Mr. Hennelly have done that. Now, let's take the evidence that the State brought to you here in this case and discuss it briefly. When a man is charged with murder, with taking the life of another human being, first the State has to prove that there is a dead body. We have done that in this case. They have to prove the identity of that dead body. They have to prove the cause of death, that he met his death, his death was the result of the violence, or whatever might have been done to him by the persons charged with his murder. Now, the first day of this trial was consumed [716] mainly by these witnesses that the State brought, proving that Walter Lee Donnell died in the State Prison in Jefferson City, in Cole County, on September 22nd, 1954. The other testimony showed that he died of stab wounds, some in the front, from instruments like a knife and some in the back from round sharp instrument, and from a blow on the head

crushing the right side, inflicting a mortal wound to the brain, and that there were other abrasions about his body. We don't think that there is any question of any of the testimony in this case, but what this man was Walter Lee Donnell. There has been no evidence put on by the defense that it wasn't Donnell, and no evidence to show that he died from any other wounds, other than the external violence that he received there in his cell in Death Row on September 22nd, 1954. We think that question is settled. Now, you come down to the question as to whether this man here, this man Stidham, who stands charged here with this crime, is one of the men who entered into this conspiracy and went into his cell and killed this man on the night in question. This gentleman is the sole question and the main question in this lawsuit. The State says he did, and he says he didn't. There is your issue right there. Now, what did we bring to the stand, what did the State bring to the stand in the way of evidence, to show you that this man died at the hands of this man, and his co-conspirators. You must realize from the [717] outset that this crime was committed during a riot at the Missouri State Penitentiary, and you can call upon your common knowledge and your common horse sense that the authorities in piecing the evidence together, that it was, must necessarily be piece meal. It is not like a crime committed down on the streets in Poplar Bluff or in some other city. It was committed in the State Prison during a riot. Now, they brought these witnesses to the stand, two convicts, a guard, and these six or seven officers who testified about this man's confession, to show you that he was there, that he went down there to Death Row, into the cell at the time this murder was committed; that he was back and forth in and out of there several times, and that he made these threats against Donnell for being a snitch and for being a rat and that he was going to kill him.

All that fits in together. I am satisfied in my own mind that Mr. Riley would never have come here and presented this case—

MR. HENNELLY: I certainly object to that, and ask that it be stricken and the Jury instructed to disregard it and a mistrial declared for the reason it is an opinion of counsel and outside of the record.

THE COURT: Will counsel come up here and state to me his statement, his statement wasn't finished. You said you were satisfied in your own mind—

(Out of the hearing of the Jury)

[718] MR. HENSON:: That Mr. Riley, that is as far as I got.

THE COURT: Now, what were you intending to say?

MR. HENSON: That Mr. Riley wouldn't have presented this case if his sole testimony was furnished by the two convicts who testified for the State.

MR. HENNELLY: That is getting pretty close.

THE COURT: Let the objection be sustained.

MR. HENSON: Now let's take for just a moment Gentlemen, and go over this testimony that the State presented here to you on what happened down there that night, what was seen and what this Defendant did that night, the night of the riot. You recall the testimony I believe of this guard Dietzel who came here on the witness stand, who testified about the riot starting somewhere around six-thirty on the evening of September 22nd. You will also recall that, and I am pointing this out to you on account of instructions by the Court, because of this conspiracy. You will recall the statement that Dietzel made from the witness stand about the conversation between DeLapp and this other group of men he testified about, who came down there to get Stidham out of Death Row. You will recall that he was standing there back in this direction, back in there, and I direct your attention to Exhibit 1,

back here between Gate No. 2 and Gate No. 3, going into Death Row, between this group of men headed by DeLapp, and Stidham back here in his cell somewhere along here [719] on this side. I forget just exactly where it was. He was standing there where he could see and where he could hear what was going on. This is a guard in the Missouri State Penitentiary, and he says that DeLapp hollered back to Stidham and there was some conversation, you will remember exactly what it was, about getting him out of there, and getting on with their business, or whatever it was, and I won't try to go over that, because I can't remember it verbatim. There was never any testimony on his part about any conversation between those men and any other inmates along Death Row on that side. It was all with Stidham back there, and they called him "Slick", "Slick" Stidham, and he knew him as "Slick" Stidham, and these men talked to him back there and said they would have him out of there; that they worked on that door there first, the first door and the second door and the third door. That it went on there for quite a time, thirty or forty or fifty minutes, or maybe an hour or more, that they worked on these three doors to go back there and get this Defendant out of Death Row, no, not the rest of them, but this man. And then what did they do when they got him out? Creighton told you about it back there. Of course Creighton is a convict and he has been convicted, but did you notice that his story dovetailed into the story that these other witnesses have told. It fit into what they told you. It fit in to what [720] Herman Trout told you. It fit into what this guard Dietzel told you, his story fit; that they came back there to his cell, and he testified about these threats, these threats that this guard Dietzel told you about. Herman Trout told you about going back down there, what does the Defendant say about this. Look at his story now. His story is that when he went out of there, when these boys came down there and turned him

out, and he went out of the basement out here where Death Row is located, that he went upstairs and he didn't come back anymore. That was the last time that he was there. Trout saw him down there. Creighton saw him down there and the guard saw him down there.

MR. HENNELLY: Object for the reason that is outside of the record, with respect to the guard, Mr. Dietzel, the last section.

MR. HENSON: As I remember the testimony—

THE COURT: The objection will be overruled, with this statement of course to the Jury. Gentlemen of the Jury, you are the judges of the evidence, and the credibility of the evidence, and the weight of the evidence, and you will recall the evidence, and you are the sole judges of the evidence. The argument of counsel in this case, I may say this at this time, and it will be included for any other time that there may be some objection raised during the argument of the case. The argument of counsel is for the purpose of helping [721] and assisting and aiding you in recalling and recounting the testimony and in the application of that testimony to the instructions of the Court, that in the final analysis you are the judges of the testimony and you will be guided by the testimony as you remember it. You have about ten minutes left, nine or ten.

MR. HENSON: Now, there is one other very main and important issue in this case, and a very important piece of evidence that I wish to discuss with you in the few minutes that I have left, and that is the Exhibit 16 and 16-1, which we have presented, the State has presented to you as the confession. The statement signed by this defendant Stidham on the 27th day of September, 1954, in the recreation room there at the State Prison. I want to point this out to you. If you believe this man's story that he was tortured and beat and made this confession involuntarily, then as told you by the Court, you are not to

take it into consideration in deciding this case. We are satisfied beyond any doubt that this confession is voluntary and told you by these six officers—

MR. HENNELLY: Object to that, and ask that that be stricken, and the Jury instructed to disregard it and mistrial declared as an opinion of counsel.

THE COURT: The objection will be sustained. That part of the statement as to his satisfaction, being satisfied, or some [722] such statement made by the Prosecuting Attorney, is to be disregarded by the Jury in the consideration of this case. Gentlemen of the Jury, you are to be guided by your own opinion of the testimony. All right, the request for a mistrial is denied and the cause may proceed.

MR. HENSON: I don't recall the names of all these officers, Lieutenant Eitzman, Overbeck, Billings and these four officers from St. Louis, they were down there in this recreation room according to this testimony, with two members of the Highway Patrol, this Lieutenant from Cape Girardeau and Caldwell from Fredericktown. Now everybody knows that once in a while you get ahold of a bad officer. You might get ahold of two bad officers. There have been times in the past, and there will probably be times in the future when some officers, bad officers will take some man out and give him a beating in order to get a confession, but look at it from this standpoint. Here are four men, four men who have had long service with the St. Louis Police Department, who were not only in there together at the time this statement was made, they were in there with a Sergeant from the Highway Patrol down here from Fredericktown. They were in there with a man from Cape Girardeau. Every one of those officers testified that they knew that if they beat this man, that if they tortured him any way at all, that they were liable to be prosecuted under the Federal Laws of our [723] country,

and yet these six men, two of them who never did work together with these boys in St. Louis, took the chance of being prosecuted themselves by all six going in there and hurting this boy and torturing him there as he said from the witness stand. Are you going to believe that? Then he says that they took him by the arms back here, call on your common judgment for a few minutes; that they put these handcuffs on him, that they pulled him up from the ceiling with a rope and let him hang there for fifteen minutes, then down for a short period of time, and back up for something in the neighborhood of thirty-five minutes, or a total of fifty minutes, and when he went to Springfield three days later, there were no bruises on his left hand, which was paralyzed he said, partially paralyzed. One of the doctors there that examined him there in this report said that it could be caused by this old scar down between his hand. Don't you know if that happened to that boy that if that rope was put on those handcuffs and he was pulled up like that, that he never could have stood that. He said he stood, when he got down here in front and showed you, don't you know it would have tilted him over and his head down to the floor. Don't you know that it would not only have injured his ulnar nerve, it would have injured every nerve he has got in his body and wrenched his arms out of the sockets if he had hung there for fifty minutes suspended [724] with his arm to his back? That is the kind of story he tries to get you to believe. Now, there is one other thing I want to tell you in closing, you know there are some things in the trial of a case that will make impressions on one person, and some that will make some on another, and you will recall the testimony by this Trooper up at Fredericktown, Caldwell, he says that after this statement was made, that he asked this boy, Slick Stidham, he asked him why he did it, or something to that effect, and he told him he did it

because he was a snitch, because he was a rat, and you will remember something else that he said, he says you are living under—living your life under a different code than I am living, than I live mine. I respect your code, whether you do mine or not. You know what a code is, a code is a rule of living. We have codes of criminal procedure and codes of civil procedure. They have a code of the hills you know. That refers to the rule that you live by. I think that expression stuck out with me more than anything else, this boy lives under a code. He lives under the convict's code. He lives under a code that says if you go and inform on a fellow prisoner and if you go and inform on a man and cause him to go to the penitentiary, then your sentence is death. That is what his code is, that is what he told this Trooper in so many words. If a man goes and informs on his fellowman his sentence is death. That is the [725] code he lives under. Do you know what the code of society is? The code of society is this, that if you take the life of a fellow man, that if you take it upon yourself to try him, sentence him, and convict him, and hang him, kill, murder him on the spot, then your sentence is death because that is the code of decency. The code of law and the code of society. There is just one code, just one code that the convict understands, and that is the code of death, because how are you going to have law enforcement, how are you going to have decency if the code of the convict carries a heavier punishment than the code of decency. How are you going to do it? That is all the understanding, that is the only way that the code of decency, the code of society will ever push down the code of a convict, is to make your code just as strong or stronger than the one he has got, and I submit to you that unless that is done, the code of the convict will take all of us before too long. Thank you very much.

MR. HENNELLY: May it please the Court, Your Honor?

THE COURT: Mr. Hennelly.

MR. HENNELLY: Mr. Riley, Mr. Henson, is not here, and you gentlemen of this Jury. I think that when counsel said, talking about that code, he lost his case. He lost his case when he talked about the code because if you consider the question of the code, you have got to say in your own heart [726] and conscience that this boy did not voluntarily make this statement, and I will tell you about it in a minute. When those statements were made to you about that code, I saw some of you light up, and I know that when you read this statement, then you know that it couldn't have happened that way. Let me say at the very outset that I thank you for the attention that you have given this case. I know that it is not an easy matter to leave your homes and leave your families and to sit through this type of matter. We have all done it. Let me say in addition that if I have done anything since the time this trial began to cause you to feel unfriendly toward me, if I have been too enthusiastic, if I have been too impetuous in the defense of this man, well then you take it out on me, but don't take it out on him. I was appointed to defend this man by Judge Blair in Jefferson City. I am going to tell you in all sincerity, and with all sincerity that I can muster, that there has never been a more noble cause, for this is not the case of James Stidham, this is the cause of James Stidham. Now my friends, when we began, there were thirty-two jurors here, and I asked everyone of you a series of questions. I asked you first of all if you could be fair and if you could be square. I asked you if you had anything at all against this man. I asked you if there was anything in your heart or your mind or your conscience that would keep you from giving [727] him a fair deal, and all any one of you had to do was to raise your hand and say, I can't be fair, I can't be square, and you

would have been out of here. Now, I took you at your word. And when we got through, when I got finished, the State took ten names from that list and there were twenty-four names left. The twenty-four names were given to me and I took some other names off.

MR. RILEY: The State only got six cut.

MR. HENNELLY: I am sorry, I am confused with the County.

THE COURT: All right.

MR. HENNELLY: But in any event, when the list was given to me, I struck the last names off, and you twelve people are the people who are now listening to this case, and this is the last time anybody is going to be able to speak for James Stidham. When I get finished, the State is going to close, and then there isn't going to be anybody else speak for him. I don't have anybody with me. I am going to tell you that I have been fighting for him since we began and I am going to fight and fight and fight, and if the time ever comes that I haven't got that much gumption in the trial of any case, and particularly in this type of situation that I don't give a client everything I have got, then I am going to quit. Now then, as counsel has told you, when a man comes into a criminal case, it is presumed that he is innocent. When he sat down there, you had to say to yourself, [728] I accept the fact that he is presumed to be innocent and I am going to make the State prove the case to me. It is going to be their job to prove him guilty beyond a reasonable doubt. In some other countries when you get arrested, you have to prove your innocence, but in this Country, thank God, when you get arrested, they have got to prove it, and not just prove a part of it or a piece of it, but they have got to prove it to you and prove it to you beyond a reasonable doubt and that is what the law is. That is not my thoughts, that is the law, that His Honor, this distinguished Judge, and his wisdom has given

to you and you said you would live by that law. Now, there have been three pieces of evidence in this case. No. 1, let's consider it if you will. The testimony of Mr. Creighton, Mr. Creighton, who just prior to the time that he had come down here, that he was in the State Hospital. Now, I don't say that the fact that he was in the State Hospital, and believe me men, that you can't believe him, but I think there was something that was more significant about that, and that was when I asked him about how he went up there, he said oh, I put on a good act. He said I put on a good act, I fooled them. I fooled them and they sent me, sent him up there, sent me up there. I fooled them and the thought must have occurred to you men how he must have gone through that act, what a great act he must have put on for [729] them, and don't you think maybe he put on the same kind of an act for you? Now, you are the sole judges of his credibility. You are the ones who are going to say, would I convict anybody on his testimony, would I convict a dog on his testimony. My friends, when a witness testifies from the witness stand, you just don't listen to what he says, if that is all you had to do, all you would need would be ears, but you call upon all of your own experience in life. You apply it to the probabilities and you say let me see if it could have happened that way. Now let's look at the probabilities. No. 1, Mr. Creighton, were you promised anything, did they even discuss parole with you? Is there a man on this Jury, is there a man within the hearing of my voice that thinks that a convict who has gone through everything in God's green earth to try and get out of the Penitentiary, that he hasn't even discussed a parole? And he says now that he is living down in the County Jail. Do you think he will ever go back to the Penitentiary? Do you think he will ever go back among the people that he has testified against? Ask yourself, do you think that he will? Now,

you can't be just a little bit of a liar. You can't lie just a little bit, there is something indivisible about the truth. You can't be anymore little bit of a liar than you can be a little bit pregnant, and when somebody tells you a lie one time, then [730] you say by God, I don't know that I will ever believe them again, and let me ask you right now, did he not lie to you when he said there has been no, not even a discussion about a parole? Let's look at him a little bit further. Counsel said his testimony jibed and fit. No, no, his testimony doesn't fit at all. His testimony doesn't fit with Trout and his testimony doesn't fit with the alleged statement in this case. To begin with my friends, Creighton tells you that all during the time that they were down in Death Row, that the Defendant hollered at Creighton, that he hollered at Donnell, that I am going to kill you, and I am going to do this. Why don't you know in all of your good honest judgment that if he had done that my friends that when there was a guard on duty every minute of the time stationed down here, that they would have walked a guard in here, they would have walked ten of them in here. They are the ones that would have come in and said yes, he threatened him time after time. Not one comes in, not one, not a single soul comes in but Creighton. Now, do you believe that that happened my friends? Does that give you a reasonable doubt with respect to his credibility? Does that cause you to have some question about his credibility? Now in addition to that, if you believe Creighton's testimony, you must assume that this happened, that as those men came down and as they let them out of the cells one right [731] after the other, that the first thing that Stidham did was that he ran over to what is his name's cell, over to Creighton's cell, and that he went from Creighton's cell over to Donnell's cell, but that isn't borne out, is it, by Trout's testimony, because if you recall, Trout said that they came out and that the

knives were over in that corner, and that it was at least thirty minutes before they went back. Reasonable doubt my friends? Reasonable doubt? Now, on Creighton's testimony, on Creighton's testimony, did he offer anything when Creighton got through testifying, did he take away from this man a scintilla of his presumption of innocence? And let's look at something else, he said I was on the farm, and somebody else put some faith in what he said, somebody else put some faith in him, they put him on the farm some years ago and he walked off. He betrayed their trust and yet on his testimony, can you say I will convict him? No, no, I don't think you will. You will say no, I think you lied to me. I don't think anybody is going to say well, I am going to forget about this thing, I am not going to stand on the evidence, you can't say, you can't say out loud, My God I wash my hands of the blood of this man, and let's give him life and let's do that. You don't do that. You have got to be fair. You said I will make them prove the case to me, and I will make them prove it to each one of us. Now, let's look at the [732] next bit of testimony. The next bit of testimony is by Trout. Trout tells you, my friends, who incidentally tells you that there has never been a discussion of parole, Trout tells you that he is over in the County Jail, do you think he is ever going back to the penitentiary? Trout who also asked you to put some faith in his testimony, he walked off too. He left somebody with a red face. Now, let's look at him. Let's look at his testimony. Trout tells you that when he saw the thing, that he saw he was down in here. My friends, look at this. He said he was down in here hiding. He said he was in the dark. He said I was in the dark. Now, let me ask you in all sincerity, taking into consideration the lighting conditions, taking into consideration the way that that thing is set up, is there anybody here that can tell me in all sincerity and in all honesty that they believe that Trout

saw what he said he saw, and then on cross-examination, when you keep nagging at him, you find out that he left. You find out that he went downstairs. And there are little things, when I asked him about the water, and now I watched you, the water was important wasn't it? Why was it important? These are the little things that you have got to watch for in the trial of a case so that you don't make any mistakes, so that you don't convict an innocent man. If my friends, if he had turned off the water would there have been any water [733] here, in which they could have washed their hands? No, no, so when I read him back what he had testified to some month ago, it said the water and steam—he said no, I am talking about a boiler. That is a little thing, but on Trout's testimony, and they need Trout and Creighton my friends, but neither one of them said they saw who killed Donnell. Neither one of them said that they saw it. Now, let me ask you in all honesty and in all sincerity, based upon either or both of their testimony, if it were you or someone that you loved, would you convict him? Would you convict him? You know that you wouldn't. You know that you wouldn't, because when I leave here today you may never see me again. When Mr. Riley leaves, you may never see him, but my friends, your own heart and conscience is going to be with you forever, and if you make a mistake in this case, you can spend the rest of your life looking into the fire and worrying, did I make a mistake? I swore that I would be fair. I swore that I would make them prove the case to me and prove it beyond a reasonable doubt. You will say, did I come into this case with something in my heart which was not being fair? I don't think so. I am confident in you. I am confident that none of you did. Now, let's look, let's look at what they refer to as the third piece of evidence, 16 and 16-1. All right, the testimony my friends, in this case, clearly is that this [734] Young man had time and time

again denied that he had anything to do with that murder and then on the morning in question, now please when you sit down and when you stop to consider this, will you please consider this matter closely, will you do that? And while you say to yourself what in God's green earth, what in the world would have made a man change his mind, what in the world would have caused him to say after days, I had nothing to do with it, and then to say yes, I had something to do with it. Call on your own experience in life. Can they put that over on anyone of you? If there was not any other evidence in the case, could they put that over on you? If there was not a scintilla of evidence with respect to some type of beating, what do you think, do you think that he sat there and then all of a sudden the Holy Ghost calls down upon him, and he said, oh, I will tell you all about it, let me tell you, what do you think, do you think that is the way it was my friends? Do you think that is likely to happen with a man behind the bars that has nothing to lose, that he couldn't have sat there for hours and hours, unless they beat him and unless they tortured him in the way that they do behind iron curtains? I am going to tell you quite honestly and earnestly, don't ever let them pull that same thing on you or pull that same thing on me, because if they would, you would confess to anything, say for God's sake, let me down, I will say whatever you want me to say. Now, doesn't [735] that standing by itself, doesn't that standing by itself cause you to say that they must have done something? I know that they must have done something. Counsel talks about these police officers. Why he answered his own question. You don't think do you, that there is anybody in the wild world that thinks that a police officer is going to get up there and say, I beat a man, I beat him, take me to the penitentiary, take me to the Federal Penitentiary. You know they are not, and when counsel says there are some bad police officers, yes,

I am glad he admitted that, but I will tell you this my friends, that what he says, he may have seen some police officers, he can also tell you that he will never see one that will come in and let another one down either. They are not going to let each other down. They are in this thing together, and doesn't the thing smell a little bit? Don't you realize my friends that—what a rough job we have got? Stidham stands alone except for me. He stands alone. This thing happened inside behind the walls. This thing is behind the iron curtain, and now don't you see why just last week when there existed a record, a permanent record in our State, a permanent record, in which they said he died as a result of gunshot wounds, what in the world must have happened, what moving forces they have they can go in and change that record and come down here with this other record. They had to add the other thing to it. Doesn't that cause you to be suspicious? [736] Don't you say My God, I had better watch out, I had better watch out, I am liable to make a mistake here. Doesn't that cause you to say I am not satisfied beyond a reasonable doubt? Now, let's talk about the code, and this to me my friends, when he said it was a big thing, it is the biggest thing to me too, with respect to this statement. After we left Creighton's cell, I saw that Donnell's cell had been opened, and someone said, let's get Donnell, so we went in, besides myself in Donnell's cell, and I know that Paul Kenton, Laster, Thompson and Linder were there. That is it. Do you think my friends, that the man who says, I live by a code, that I don't snitch, and that I live by a code, by which I think that anyone who snitches ought to be killed, do you think, do you think that he would have snitched himself, unless they were about to tear the arms out of him? That is it, and I knew you caught it. I watched you. That is where they made their biggest mistake in this case, they tried to fatten it up too much, be-

cause they say, you heard them, here is a man who says, I will never snitch, if anybody snitches, kill him, and then for nothing, he should snitch. He should snitch on Linder. He should snitch on Thompson. No my friends, no, this man is telling you the truth before God, he tells you the truth. He tells you the truth when he tells you they tortured him. He tells you the truth when he says he had nothing to do with it. Now, what about this my friends, if he [737] does not tell you the truth, and if he wanted to make such an open and aboveboard statement, if he wanted to clean his heart for these distinguished officers, well what in the world caused him, when he got down to the State Hospital, what caused him then to tell them his story immediately? This isn't something that was concocted yesterday, this isn't something that is changed like the death certificate last week, this isn't something that we just dreamed up my friends, there is something that part of the official records of the Federal Government, and that which he went down there a couple of days later and he told them, he said I was hung up, he said look at my hand. He said I am paralyzed in my left hand and told you that he had never had anything, any difficulty with his hands. Does that give you some reasonable doubt my friends? Do you not in good conscience, do you not say in all sincerity and in all honesty, don't you say My God, they must have beat him, don't you say I know they beat him?

THE COURT: Come up here Mr. Ehlers. (Out of the hearing of the Jury) This is the third time in your argument that you have said "My God". In the opinion of this Court that is the use of profane language, and I want to call your attention to it, and I want counsel to refrain from such language in his argument.

MR. HENNELLY: Very well.

[738] MR. HENNELLY: You know, don't you know honestly my friends, don't you know that they had to do something to him? Now, and then there is something else in the case, isn't there? You know when we consider evidence, when you consider what is going to be necessary to convict a person, it isn't what a person says, all that I have to do is move my tongue a certain way to say a certain thing, and I may not be worthy of belief. So, what does the Jury want, a jury doesn't want talk, a Jury wants facts, and a Jury wants physical facts, in order to be satisfied. Now, let's look at the aspects of this case, which concerns itself with physical facts. You see my friends, a lie, you can always take a lie and put another lie to it, and the only time you change that is when you finally get down to the physical facts, because you can't change a physical fact, can you? Now, let's look at the physical evidence in this case. Lieutenant Barton tells you my friends that when he goes down into that cell, that night, that there was blood all over the place. He tells you there was blood on the floor and blood on the walls. There has not been a single witness who came into this Court Room, who told you that at anytime they saw James Stidham that night that he had any blood on him. Now get that. Don't you think that you could, do you think you could have gone in there and participated in that type of thing without getting some blood on you, and you heard the officer testify that there [739] is a method and a means whereby they can break down the blood. We may all have different types of blood. In fact, some of us may have the same type, but there are a number of ways you can break it down in four big sections. You can also break it down again. And if any of Donnell's blood was on this man, any of his blood, don't you think they would have brought that laboratory man in here and don't you think that when Lieutenant Barton tells you about today, this afternoon

he comes in and he said, I saw him out there, I saw him, don't you think that if there had been a bit of blood on him, don't you think that they would have had that in here my friends? And don't you think that if any of this man's fingerprints would have been anyplace around there, they would have brought that in here? These are things you can say, I don't have to guess about. This man says he was not in the cell, his fingerprints are in there. The man says that he did not cut the man, his blood type A, he has Blood O on his pants and he had blood on his shirt. You must have gotten it in there. That is not in this case. They prove his innocence, I didn't have to prove his innocence. The State proved his innocence to you. And doesn't that make sense to you also my friends, doesn't it make sense to you that to anyone who had been down in Death Row, that if they would have wanted to wash themselves, where would they have gone? Where would they have gone? They would have [740] gone in that shower. Do you think they would have gone here hidden in darkness where they could have washed themselves with a shower next to Stidham's cell, that he would have come down here? No. No, these are things in which you call on your own experience in life. These are things in which you say, I don't believe it, I am not satisfied beyond a reasonable doubt. I don't have to clean up the dirty linen of what happened in the Penitentiary. I don't need a state job. I am a citizen and I am here to do my duty, and life is getting pretty short for the youngest of us. It is getting so doggoned short, I am not going to my grave wondering whether I have convicted an innocent man. Now then, motive my friends, motive, say to yourself when I ask this question, tell yourselves who has got the biggest motive to kill Donnell, who has got the biggest motive to kill him, Linder, Thompson, Linder and Thompson had the biggest motive in this case to kill him, didn't they? Because the Defendant testified that this fellow Donnell

had been hollering at the—that the fellows from St. Louis was going to get him. He said, I didn't have anything to do with it. Now then, if this man's statement is right, that Linder and Thompson hit him with this, if that section of his testimony is right, are you going to believe part of it and disbelieve part of it? Then would they be the ones with a motive, wouldn't they be the ones that should be on trial and yet what do we know, [741] what do we hear in this case? We hear that tried in this case for the murder in which there is supposed to be a conspiracy, is the Defendant Rollie Laster, William R. Hoover, Kenton, Noble, DeLapp and Joseph Vidauri, no Thompson, no Linder. Now can you imagine that? Those are the men with the motive and if you believe his testimony here about Linder and Thompson, doesn't it make more sense to you here my friends, doesn't it make more sense to you that the way that that got in there was the way that everything else got in there, that a St. Louis Police Officer who made up his own mind as to who was responsible for the thing told him to do it, doesn't that make more sense to you my friends? Think of that, say to yourself, well if he says in his statement that Thompson and Linder were masked, what happened to the masked people, who are the people with the masks? And then the ones with the masks are the ones that get away. They are the people that get away. What is left, Stidham stands alone. Stidham stands alone hoping that in your heart and in your conscience, that down deep in your Christian decency my friends, in your Christian decency I say, and in all sincerity when this Court tells you in his instructions that you have got to be satisfied beyond a reasonable doubt, I feel confident there is bottomed in such an instruction the thought that there is someone greater than you and I; that there is someone and something that if a man makes a mistake [742] and if that is not proven beyond a reasonable doubt, there is someone to take care of that. There is someone

who can straighten that out. But you my friends, all you have to do is be fair, all you have got to do is be honest. Now then, with respect to the Doctor's testimony my friends, from down at the hospital, those records were read to you and the first record indicated that when he went in there, they applied the pinprick method and the doctor told you what that meant, and of your own knowledge, I know you know what that means. You know and perhaps have seen that same thing, where they determine your reflexes and that is a method which is sometimes used either with or in addition to the statement of one, and if you apply pinprick pressures to certain points and there is no reaction, then there is some damage, then there is some damage to the nerves in that hand. That record is in this case. That record was put in here. Now my friends, I have I think forty-five minutes to argue this case, and I am going to close now, and I am going to close with all the sincerity that I can, because I have done all that I can. I have done everything that I possibly could for this young man, and I don't think you are going to say that because he was in the Penitentiary that he is expendable. I don't think that you are going to say, well, let's not look at him in the same way that we would look at everybody else. I don't think you are going to say, well let's just convict him anyhow. I [743] don't think that you are going to say let's not even think about this, not consider this evidence, not be fair. I don't think there is a man in the world who would do such a thing. I think that down deep in the heart of every man he realizes that there just isn't any room in your heart for hate, anymore, and that for all of us who start out in life, maybe some of us might end up in this chair, maybe some of the others in this chair, but we can't say to him, we are going to abandon you, we can't say to him, we are going to forget about this thing, we are not going to give you a fair trial.

And I am wondering if I were to honestly submit this case to one greater than all of us, not only one of charity, not only one of love and one of honesty, but omnipotent, I am wondering if I would even have to ask, based on this evidence, for anything more than an honest verdict. I beg of you my friends, I beg of you to consider this case as you would consider it in the same method that you would someone that is near and dear to you, because today you are tall as a tree, each one of you, this is not a matter to be decided by some one person. If the President himself were to come down here and try to tell you what to do about this case, well you could laugh at him, because just as His Honor is the Judge, as to the law, you are a judge as to the facts. Twelve of you are judges as to the facts. You in your own mind and heart and conscience have sworn that you [744] would give him a fair trial, and if you do so my friends, there is only one verdict that you will bring in, and that is a verdict of acquittal, and for God willing and good conscience, you can do no other. Thank you.

MR. RILEY: If it please the Court.

THE COURT: Mr. Riley.

MR. RILEY: Mr. Hennelly and Gentlemen of the Jury. As you know by now, this is not my home. I am from Cole County. At the outset I want to thank the Court and all the officers of the Court, and especially you members of the Jury, for your time and attention to this case. Mr. Hennelly has said that Stidham stands alone in this case, and at the outset I want to tell you gentlemen of the Jury, that Stidham doesn't stand alone. If there is a witness anywhere within the State of Missouri that Stidham needed to prove his case or to back up a word that he said on that witness stand, all he had to do was ask that the Circuit Clerk issue that subpoena, and that witness would be here. He can have one or all, any bit that he wants. He don't stand alone. Where are those three men, Crabtree,

Lyons and Reed that he said he was up in B Hall with, where are they? Why didn't he have them down here? All he has got to do is ask for them. Was he afraid of what they would tell? The State of Missouri never knew until he said it from the witness stand who he was going to say that he was with that night in B Hall. They never [745] knew at all and had no way of knowing. He could have put those men on that witness stand. They would have testified that he was with them in B Hall, just like he told you from the witness stand, if he had been there. But did he put them on there? There isn't but one conclusion that you can draw Gentlemen, is that he knew if he put them on there that they wouldn't back up his story. That is the only conclusion that you can draw from that. Now Gentlemen, I realize why Mr. Hennelly is considerably exercised about this case. The old saying is, when the law is against you, try the facts, and when the facts are against you, then try the police officers, and that is exactly what he is going to do. He says that the police officers beat this confession out of him, beat this confession out of Stidham. Now, if you were going about the business of beating a confession out of a man, what would you say, would you let him write it out in his own handwriting and take a chance on his handwriting not comparing after you had beat him up, to what he ordinarily wrote before and after that time? No, you wouldn't take a chance on that, you would type it up on a typewriter and say here, sign it. It is a lot easier to write William Stidham than to write two pages out, and let him write it out in his own writing, own handwriting, and as far as that is concerned, as far as his injuries are concerned, there wasn't a single doctor that said he had any injuries. The [746] first doctor said he used the pinprick test, but that in his opinion, that injury was from an old scar. The second doctor said that the only way he knew there was any stiff-

ness in those fingers is from what Stidham told him; that he didn't use the pinprick test and that he didn't see any injury whatsoever on the man when he examined him. You remember the first part of the case, Mr. Hennelly made a considerable amount, and brought attention to the fact that in this it says he was twenty-five years old. I don't know how old he is, but in here he said he was twenty-five. Mr. Hennelly says that is the officer that says that. Stidham gets up on the witness stand and says that he didn't say he was twenty-five on September 27th, that he was actually twenty-eight. These witnesses said that Stidham, these witnesses that Stidham brought in here say that on the 29th day of September, that he told them he was thirty-four years old. And look at those fingerprints, that is the left hand that had to go out flat like that to take those fingerprints, and if you will look at that, there is more ink on the left fingerprints than there is on the right fingerprints. Anybody can see that. The left hand is more plain on it than the right. Maybe he is mistaken as to which hand was stiffened there on that day. Now another thing Mr. Stidham couldn't remember this picture being taken. Well, he only stood by that officer on one day, and that was September 29th, two days [747] after he had been beaten. That picture shows there isn't a thing the matter with his left hand there.

MR. HENNELLY: Object to his interpretation of the Exhibit, and ask that it be stricken and the Jury instructed to disregard it and a mistrial declared.

THE COURT: Gentlemen, you are the judges of the testimony, the Exhibit has been received in evidence, and you will give it such weight as you deem proper. The objection is overruled.

MR. RILEY: Now Gentlemen, you think of the things that Mr. Stidham left out in his testimony. Did Mr. Stidham ever deny that he made threats to kill Creighton

and Donnell prior to that night? Did he ever deny that? No, he said he didn't make any after six-thirty. He never said he didn't make any at anytime. Why wouldn't he say that he didn't make them at anytime? Why did he have to start at six-thirty with his denials? Mr. Hennelly says why would Creighton testify against him? Well now Mr. Stidham was down there to kill Creighton and Creighton's own testimony was that he was down there to kill him, and tried to kill him, and that they put him in the hospital with a broken jaw. Mr. Hennelly said what was the first thing that they did, did they go back to Donnell's cell, or would they run out of that area there, and he calls your attention to all these people who ran out. Go back over the testimony. These cells were all full here. Stidham [748] was back here in 23. Laster was in 21. And that when the riot was over, everybody was in their cells except Laster and Stidham. No one else was let out down there. The testimony shows that DeLapp and the rest of them got Stidham and Laster out, so that they could kill Creighton and Donnell. They didn't let anybody else out down in Death Row. Just Stidham and Laster, and according to his statement, Stidham and Laster are the ones that killed Donnell. They are the ones that slashed and cut him with the knife and the ice pick. And another thing, Trout says Stidham stopped here at the wash basin and took off his clothes and dropped his clothes in the water on the floor, took off his undershirt and washed himself, and Mr. Hennelly says why didn't they stop back here at 22 where the shower was and wash their hands in the shower. Now, why when you go in your bathroom, do you go in there and wash your hands in the shower, or do you wash them in a wash basin, now which do you do? Do you wash them in the wash basin? That is exactly what Stidham did. Why don't we have blood on Stidham's clothes? Because Stidham took his clothes off that night and left them there in the water.

MR. HENNELLY: Object to that Your Honor, outside of the record.

THE COURT: The objection is overruled.

MR. RILEY: Now Gentlemen, are you going to believe these police officers, two of them who are Highway Patrolmen right [749] here from your own area, who say that Stidham wasn't beat, do you think now, Mr. Hennelly says those police officers may do it, and those officers would stick by each other, but do you think Sergeant Little from over in your neighboring town of Cape Girardeau, and Caldwell from your neighboring town of Fredericktown, do you think they would have stayed in there with those other officers, if Stidham was beat like he says he was, and see them beat that man up and hang him up like they said he did? Would you do it? Even if you were one, you would say I will have none of that, and get on out, and if you want to beat him up, you beat him up, but it is none of my business, and I won't have none of it, and that is what you know these outstate Highway Patrolmen would do. If they didn't, if they wanted to beat him, they would have nothing to do with anybody else who would, and they would have got out of there, and they wouldn't be down here before you or their neighbors, and telling you under oath that they didn't beat him and that nobody else beat him. Now, that is what you can say. He can say what he wants to about the St. Louis Police Officers. You and I don't know much about them, but we do know about those Highway Patrolmen who are our friends and neighbors, and need—

MR. HENNELLY: Object to that, an attempt to inflame and prejudice the minds of the Jury, and ask that it be stricken and the Jury instructed to disregard it and a mistrial declared.

[750] THE COURT: The objection is overruled. You may proceed. The request is denied.

MR. HENNELLY: Very well.

MR. RILEY: Now Gentlemen, you have looked at these exhibits here, Stidham's handwriting is practically the same after he was beat up and hung up for fifty minutes, as it was when he sat calmly in his own cell two months later. Ordinary people, and you are ordinary people, can look at that and tell that. He signed his name exactly the same, there after he had been hung up for fifty minutes by his wrists, as he did when he sat calmly in his cell on December 7th, and again on February 23rd, when he was writing to the Honorable Sam Blair of Cole County, Circuit Judge of the Circuit Court, as he did when he says he was hung up and crippled. His handwriting and signature is exactly the same. Now Gentlemen of the Jury, I don't propose to take up all the time allotted me to talk to you about the discrepancies in Stidham's testimony, but remember Dietzel said he was up in B Hall in the cell with nobody that night. Did Stidham get back and take the stand and deny what Dietzel said? No. He was content to let it go.

MR. HENNELLY: Object to that, and ask that it be stricken and the Jury instructed to disregard it, and a mistrial declared, and that is in violation of the Constitutional Rights of the Defendant.

[751] THE COURT: The Defendant has taken the witness stand in this case and his failure to testify may be commented on about certain things. What he testified to can be commented on—

MR. HENNELLY: Not in rebuttal I don't think.

THE COURT: The objection is overruled.

MR. RILEY: His testimony was that there were fifteen police officers in that little classification room that talked to him at three o'clock in the morning. Well Gentlemen, put four more men and a big table in that Jury box, how crowded would it be? Is that reasonable that fif-

teen men would crowd in a little old place like that? What do you want fifteen for anyway? The police officers say they weren't there, but yes, he insists there were fifteen there besides himself and the chair and the table. Now, do you want to believe that, or do you think maybe Mr. Stidham is just pouring it on a little thick, trying to believe that why tell one lie, tell a big lie, you can make them believe a big lie, the bigger the better, than you can a little lie. Now Gentlemen, this case boils down even without the confession, the facts and circumstances, and evidence which the Court here says you are to consider, and which upon you can convict him alone, the circumstances show even without the confession, that Stidham and these six others, and don't you think for a minute that if Thompson and Linder were down there they wouldn't be charged too. But did you hear Thompson's name or [752] Linder's name mentioned by anybody? The guard said that he didn't see them down there. Creighton said he didn't see them. Trout said he didn't see them, and no one saw them down there but Stidham said they were there. The only reason in his testimony, he doesn't say that they were there, he doesn't say Thompson in his statement, doesn't say Thompson and Linder was there, he says I heard an exchange of words between two guys referring to each other as Thompson and Linder, but he doesn't say I saw Thompson and Linder there. He just said I heard their names mentioned. Maybe their names were mentioned, maybe they were mentioned by some of these six, I don't know. But he doesn't in his statement say that Thompson and Linder was there, and he doesn't snitch on Thompson and Linder either, as Mr. Hennelly would have you believe. He just said he heard their names mentioned. I don't know that they were there. There were two guys that were masked. He doesn't know who they were, and he doesn't say that it was Thompson and Linder.

Now Gentlemen of the Jury, the purpose of any criminal prosecution has two purposes. One to punish the guilty, and two, deter others from committing the same crime, and that is the purpose of this prosecution here. Now Gentlemen, shall Stidham be punished and shall others who are in similar circumstances be told by you and by your verdict here today, that the people, not only the people of Cole County or the people of any [753] other county, or only Butler County, but the State of Missouri will not stand for the convicts in the Missouri State Penitentiary to take the law in their own hands and kill and murder who they shall see fit without the benefit of trial by jury. Donnell didn't get it. Stidham is getting all of his rights, but he didn't give Donnell a trial by jury. He didn't give Donnell the right to subpoena a witness in his behalf. He didn't give Donnell a lawyer and a chance to come in Court and defend himself. No, he snuffed him out by the code that he lives by. And I say to you Gentlemen, by the code that he lives by and the code—is the code that he should die by, and you can put that in your verdict here today. Thank you.

THE COURT: Now Gentlemen of the Jury, there has been prepared for your convenience two forms of verdict which you may use in this case according as you may find the facts to be under the law and evidence in the case. Remember the instruction of the Court that all twelve of you must agree before a verdict can be reached. After all twelve of you have agreed, only the foreman of your jury needs to sign the verdict. You will retire to your Jury Room to consider this case, and the first thing that you should do is elect one of your number as the foreman of your jury. Then you will proceed with the deliberation in the case, in order to arrive at a verdict. Now, I think before—it probably will [754] be a lot cooler in the Library Room for the Jury to deliberate in there, than it would upstairs in the Jury Room. It is pretty hot up

there, but possibly some of you want to go to the rest room before you proceed with your deliberations in the case. Mr. Sheriff, I will ask first that you take the Jury up to the Jury quarters, and then when they are ready to retire and to consider of their verdict, you bring them down and back into the Library Room, and have one of your deputies check to see that the Library Room is cleared out and then you can put the Jury back there. If you arrive at a verdict, the Sheriff will be back by the door inside of the Court Room, just knock on the door when you have reached a verdict or when you either wish to convey some information to the Court, and then you can be brought back for those purposes, or for whatever purpose might arise at the time. So you will first go to your Jury Room, and then retire to consider of your verdict. The Jury may then retire to consider of your verdict.

The Jury then retired at 3:32 P.M. to consider of its verdict.

4:55 P.M.

THE COURT: The Sheriff has brought word to the Court that the Jury requested of the Court another form of verdict in the case and they stated to the Sheriff that they had "messed up" the forms that were furnished them by the Court. The record [755] may show that the Court furnishes them with a form, both for finding the Defendant guilty of murder in the first degree, and for finding the Defendant not guilty. The Court has prepared two forms of verdict which he has written in the right hand corner the Roman Numeral II, to indicate that this is the second form that was furnished to the Jury, which includes a verdict by which they might find the Defendant guilty of murder in the first degree, and leaving a blank space for the fixing of punishment, and a verdict, We, the Jury, find the Defendant not guilty.

MR. HENNELLY: I would want, when they do come back, to be able to examine the form that they have messed up, and at that time perhaps I might make some objection to it, and I, may the record show I am not objecting to the Court now calling them into the Court Room.

THE COURT: I would have to convey to them the information not to destroy the one that they have messed up.

MR. HENNELLY: That is all right.

THE COURT: I will just tell the Sheriff, when you take the forms No. 2 in to them, tell them not to destroy the other one, to bring the other one back with the instructions and the verdict that they return, and the one that they have mutilated or destroyed or messed up, as they said. All right.

The Jury then returned into Court at 5:07 P.M.

THE COURT: Just be seated Gentlemen. Gentlemen of the Jury, [756] have you arrived at a verdict?

MR. GAEBLER: We have.

THE COURT: Mr. Gaebler, are you the foreman of the jury?

MR. GAEBLER: Yes, sir.

THE COURT: Before I receive the verdict, I wish to make just a little record. You have brought back two sheets upon which there are forms of verdict, and the Sheriff brought me a message a moment ago, and said that you asked for additional forms of verdict, and the words that he used, was that the first form that had been provided was "messed up". I don't know what your exact message was.

MR. GAEBLER: That is right.

THE COURT: And I have here a form of verdict, two verdicts which are not signed, and on which there is some writing in ink, is this the form here, that I have in my hand, and you asked for another one?

MR. GAEBLER: Yes, sir.

THE COURT: Would you mark that with a Roman Numeral I, Mr. Ehlers, and initial it please?

The Reporter then marked a verdict form Roman Numeral I, LWE, 7/20/55.

THE COURT: I have then here in my hand two forms of verdict on one sheet of paper, which I have designated by Roman Numeral II, in the right hand corner, which was the form of verdict which the Court sent you after the message that he [757] received from the Sheriff. I wish to ask you now at this time Gentlemen, have you agreed upon a verdict?

MR. GAEBLER: We have.

THE COURT: We, the Jury, find the defendant, James William Stidham, guilty of murder in the first degree and assess his punishment at imprisonment in the State penitentiary during his natural life. Signed Herbert Gaebler, Foreman. Is that the verdict of all twelve of you gentlemen?

A. (General assent) Yes.

THE COURT: Is an individual poll of the Jury requested?

MR. HENNELLY: Yes, Your Honor. Excuse me, before that is done, may I request at this time that the panel be discharged and that a mistrial be declared. Let me see the first one. That is all. I just make that objection.

THE COURT: I might say for the record that the first form of verdict which the jury had, states: "We, the Jury, find the defendant, James William Stidham, guilty of murder in the first degree and assess his punishment at ..... and on the line for punishment, there is written on that line Life in Prison, L-i-f-e in P-r-i-s-o-n. And that is the form that they used first, and asked for another one, and then the one I have just read is the verdict that has been returned.

MR. HENNELLY: I just wanted to save the record on it.

THE COURT: Your objection is overruled, and the request is [758] denied.

THE COURT: Mr. Clark, you have heard the verdict which has been read by the Court, in which the Defendant was found guilty of murder in the first degree and his punishment assessed at imprisonment during his natural life. Is that your verdict sir?

MR. CLARK: Yes, sir.

THE COURT: Mr. Davidson, you have heard the verdict which the Court has just read, is that your verdict, sir, of guilty and punishment fixed at life?

MR. DAVIDSON: It is.

THE COURT: Mr. T. M. Walton, you have heard the verdict which the Court just read, guilty of murder in the first degree and punishment fixed at imprisonment in the State Penitentiary during his natural life, is that your verdict sir?

MR. WALTON: It is.

THE COURT: Mr. Barker, you have heard the verdict which the Court has read, is that your verdict sir?

MR. BARKER: Yes, sir.

THE COURT: Mr. Sparkman, you have heard the verdict which the Court has read, is that your verdict sir?

MR. SPARKMAN: Yes, sir.

THE COURT: Mr. Hinton, you have heard the verdict which has just been read, is that your verdict sir?

[759] MR. HINTON: Yes, sir.

THE COURT: Mr. Stilley, you have heard the verdict of the Court, that the Court has just read, is that your verdict sir?

MR. STILLEY: Yes, sir.

THE COURT: Mr. Crawford, you have heard the verdict, is that your verdict sir?

MR. CRAWFORD: Yes, sir.

THE COURT: Mr. James Sentell, you have heard the verdict which the Court read, is that your verdict?

MR. SENTELL: Yes, sir.

THE COURT: Mr. Lloyd Surber, you have heard the verdict read by the Court, is that your verdict?

MR. SURBER: Yes, sir.

THE COURT: Mr. Connie Fredwell, you have heard the verdict which the Court has just read, is that your verdict sir?

MR. FREDWELL: Yes, sir.

THE COURT: And Mr. Herbert Gaebler, Foreman of the Jury, is that your verdict sir?

MR. GAEBLER: Yes, sir.

THE COURT: Any further poll of the Jury?

MR. HENNELLY: No, Your Honor. I would like for the files to reflect that I would like to have thirty days additional time in which to file a Motion for New Trial.

THE COURT: I will show that the verdict is received and filed, [760] and we will go into that.

MR. HENNELLY: Very well Your Honor.

And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 429) Wednesday, July 20th, 1955, Regular July 1955 Term

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And after hearing the evidence, instructions of the Court and argument of the counsel in the case, the jury retires to consider its findings, and the Sheriff of Butler County is sworn in charge of the jury, and afterwards, on this same day, the said jury having agreed upon a verdict return into open Court and render to the Court a verdict which said Verdict is in the following words, to-wit:

VERDICT

We, the jury, find the defendant, James William Stidham, guilty of murder in the first degree and assess his punishment at *Imprisonment in State Penitentiary during his natural life.*

/s/ Herbert Gaebler,
Foreman

The above said verdict is signed by the Foreman, and returned and received by the Court. Now at this time, the Jury is polled as to their verdict and state the verdict as returned is their verdict. It is ordered by the Court that the Verdict herein be filed in this cause.

[761] Now comes the defendant, by counsel, leave of Court first had and obtained, and requests thirty (30) days in addition to ten (10) days, to file Motion for New Trial. And the Court after due consideration, does make the order that said request be and the same is hereby granted and the defendant is granted to August 29th, 1955, to file Motion for New Trial. It is ordered by the Court that this cause be passed for the filing of Motion for New Trial.

It is further ordered by the Court that the defendant herein, James William Stidham be remanded to the penitentiary, pending hearing on Motion for New Trial and further orders herein, and that he shall be returned for further orders in accordance with Court rulings.

And thereafter to-wit: On the 27th day of August, 1955, a Motion for New Trial was filed, which Motion for New Trial reads in words and figures as follows:

DEFENDANT'S MOTION FOR A NEW TRIAL

Comes now the defendant, James Stidham, and moves the Court to set aside the verdict and judgment heretofore entered in the aforesaid cause on the 20th day of July, 1955, and asks that a new trial be granted him in the aforesaid cause and for his reasons therefor states:

1. That the Court erred in accepting into evidence State's Exhibit No. 1, as it was hearsay, no proper foundation [762] was made for its introduction, it had not been properly identified and was accepted in evidence in violation of the constitutional rights of the defendant.

2. That the Court erred in accepting into evidence State's Exhibit No. 9, as it was hearsay, no proper foundation was made for its introduction, it had not been properly identified and was accepted into evidence in violation of the constitutional rights of the defendant.

3. That the Court erred in accepting as evidence, State's Exhibit No. 16, an alleged confession of the defendant, as under the evidence it was coerced and involuntary, was taken in violation of the constitutional rights of the defendant, and accepted into evidence before the State satisfied the necessary requirements of proof to introduce such a statement. The use of this alleged confession deprived the defendant of life and liberty without due process of law in violation of Article I, Section 10, of the Missouri Constitution, and in violation of the "due process" clause of the U. S. Constitution.

4. That the Court erred in accepting as evidence, State's Exhibit No. 16-A, an alleged confession of the defendant, as under the evidence it was coerced and involuntary, was taken in violation of the constitutional rights of the defendant, and accepted into evidence before

the State satisfied the necessary requirements of proof to introduce such a statement. [763] The use of this alleged confession deprived the defendant of life and liberty without due process of law in violation of Article I, Section 10, of the Missouri Constitution, and in violation of the "due process" clause of the U. S. Constitution.

5. That the court erred in not permitting the defendant to cross-examine witness Creighton completely with respect to his association and contact with one Mary Annis, and in refusing the offer of proof with respect to such testimony, as such offer would have shown the interest of the witness.

6. That the Court erred in not declaring a mistrial after State's witness Eitzman testified that "we took statements", even though the Court did sustain the defendant's objections and ordered the statement stricken, as such statement was hearsay, was not binding on the defendant, and in effect told the jury that the co-defendants had implicated the defendant, without giving the defendant the right to cross-examine said co-defendants. The Court could not cure this prejudicial hearsay because it was the type of poison which could not be erased from the jurors minds.

7. That the Court erred in not admitting into evidence and reading to the jury defendant's Exhibit B, as it was competent and relevant in touching both upon the witness Creighton's competency and credibility.

[764] 8. That the Court erred in not admitting into evidence and reading to the jury defendant's Exhibit C, as it was competent and relevant in touching both upon the witness Creighton's competency and credibility.

9. That the Court erred in not admitting into evidence and reading to the jury defendant's Exhibit C-1, as it was competent and relevant in touching both upon the witness Creighton's competency and credibility.

10. That the Court erred in not admitting into evidence and reading to the jury defendant's Exhibit D, as it was competent and relevant in touching both upon the witness Creighton's competency and credibility.

11. That the Court erred in not sustaining defendant's objection, Motion to Strike and Motion for a Mistrial, when Prosecuting Attorney Riley referred to the defendant's failure to take the stand in *rebuttal*, as such statement was in violation of the constitutional rights of no-comment. This statement was not a comment referring to defendant's failure to touch upon certain matters in his testimony in chief, but this rather directed the jury's attention to the failure of the defendant to *retake* the stand which falls within the scope of the no-comment rule.

12. The Court erred in failing to instruct the jury on murder in the second degree for the reason that said instruction was supported by the evidence and was required to be [765] given by the Court as part of the law of the case.

13. The Court erred in failing to instruct the jury on manslaughter for the reason that such an instruction was supported by the evidence and was required to be given by the Court as part of the law in the case.

14. The Court erred in giving and reading to the jury Instruction No. 4 for the following reasons:

(a) The instruction does not require the jury to find that the alleged conspirators wilfully, deliberately and premeditatedly, and of their malice aforethought killed

Donnell. It only requires that the alleged conspirators wilfully, deliberately, premeditatedly and with malice aforethought assaulted Donnell. It thereby fails to require the jury to find essential elements of the crime of murder in the first degree.

(b) The instructions by stating that Laster et al. entered into a conspiracy "to kill and murder", that defendant Stidham, at the time of such "killing and murdering" was a member of the conspiracy, that defendant had conspired with Laster et al. to aid, abet, assist or encourage them "in the killing and murdering", that defendant was present during the "killing and murdering", that he knew of the purpose of Laster et al. "to kill and murder", and that Laster knowingly aided, abetted, assisted or encouraged the alleged conspirators "in the aforesaid killing or murdering" by its continuous [766] use of the words "murder" or "murdering" constitutes a comment on the evidence by the Court, singles out and gives undue prominence to such words, and assumes that a murder had been committed.

(c) The instruction by requiring the jury to find that defendant had conspired with Laster et al. "to aid, abet, assist, or encourage them" and that defendant "aided, abetted, assisted or encouraged" Laster et al., erroneously used those terms disjunctively rather than conjunctively and allowed the jury to convict if they only found that defendant did one of those four acts, instead of requiring the jury to find that defendant did all four of those acts. Further, there was no evidence that defendant did all four of the acts and the jury was thereby allowed to convict defendant on a theory not supported by the evidence.

(d) The instruction by charging that Laster, Hoover, Kenton, Noble, DeLapp and Vidauri, entered into a conspiracy, and that defendant conspired with them, and that

the jury should convict if the defendant aided, abetted, assisted or encouraged "any of them" is erroneous because there was insufficient evidence that each of the aforesaid persons entered into a conspiracy. Defendant is thereby made responsible for the acts of persons who were not shown to be conspirators and the jury was allowed to convict the defendant upon a theory not supported by the evidence. The instruction [767] erroneously allows a conviction if the jury finds that the defendant did aid, or abet, or assist, or encourage one of the six named alleged conspirators even though the jury may further have found that one of the six named which the defendant allegedly aided, abetted, assisted or encouraged did not conspire to kill Donnell, nor did aid, assist, abet or encourage the other five named conspirators in the commission of the crime charged.

(e) The Court by requiring the jury to find that the defendant "theretofore had conspired and agreed" with Laster et al. to aid them in the killing of Donnell allowed the jury to convict the defendant on a theory unsupported by the evidence as there was no evidence of any conspiracy prior to the killing. This instruction coupled with the first paragraph of Instruction No. 5 which makes the defendant responsible for the acts of Laster et al. if he entered into a conspiracy allows a conviction of an alleged conspiracy not supported by the evidence as there was no evidence that defendant "theretofore" had conspired.

(f) The Court in requiring a finding that Laster et al. entered into a conspiracy "at the time and place and by the means" set forth in this instruction erroneously allowed a conviction if the jury found a conspiracy which was formed at the time of the killing for the reason that there was no evidence of any such conspiracy.

[768] (g) The instruction by authorizing a finding of guilty if the jury found that the defendant aided "any of them" being the persons named in the alleged conspiracy is erroneous because it is not supported by the evidence as there was no evidence to show that Jackie Lee Noble was a conspirator or to show that Jackie Lee Noble was a participant in the crime charged. The instruction authorized the jury to convict defendant if he conspired with Noble, or aided, abetted, assisted or encouraged Noble, a theory not supported by the evidence.

(h) The same objection set forth in subparagraph (g) above is applicable to a conspiracy and participation with alleged conspirator, William R. Hoover.

(i) The same objection set forth in subparagraph (g) above is applicable to a conspiracy and participation with alleged conspirator, Paul Edward Kenton.

(j) The same objection set forth in subparagraph (g) above is applicable to a conspiracy and participation with alleged conspirator, Rollie Laster.

(k) The same objection set forth in subparagraph (g) above is applicable to a conspiracy and participation with alleged conspirator, Don William DeLapp.

(l) The same objection set forth in subparagraph (g) above is applicable to a conspiracy and participation with alleged conspirator, Joseph M. Vidauri.

[769] (m) The instruction does not require that defendant Stidham wilfully, deliberately, premeditatedly, and with malice aforethought killed Donnell and thereby erroneously does not require the jury to find the essential elements of the offense of murder in the first degree.

(n) The instruction does not require the jury to find a conspiracy to wilfully, deliberately, premeditatedly and with malice aforethought kill Donnell and thereby errone-

ously allows the jury to find the defendant, Stidham, guilty even though he did not enter into a conspiracy to commit the offense of murder in the first degree and erroneously does not require the jury to find essential elements of the offense of murder in the first degree.

15. The Court erred in giving and reading to the jury Instruction No. 5 for the following reasons:

(a) The instruction, in its entirety, except for the first paragraph, is but an abstract statement of the law.

(b) The first paragraph of the instruction is erroneous because:

(1) There was no evidence of a conspiracy to kill Donnell "at the time and place and in the manner and by the means set forth in Instruction No. 4".

(2) There was insufficient evidence [770] that each of the mentioned persons entered into a conspiracy and thereby defendant is made responsible for the acts of persons not shown to be conspirators. The jury was thus allowed to convict the defendant on a theory not supported by the evidence. Defendant was also prejudiced by being made responsible for acts not connected with the alleged killing of Donnell even though the evidence was insufficient to prove a conspiracy, and to prove that each of the named persons were conspirators.

(c) The third paragraph of the instruction which states: "The Court instructs the jury that all persons are principals *who are guilty* of acting in concert and together in the commission of a crime" is erroneous in the following respects: It assumes that various persons acted in concert to commit a crime. It is a comment on the evidence because it says that all persons are principals "who are guilty".

(d) This instruction by using the following phrases: "in the commission of a crime", "when a crime is committed", "committing the crime", "actually committing the crime", "actually commit the crime", "commission of a crime", "commission of such crime", "for the commission of such crime", "the commission of such crime", "at the commission of such crime", "actually committing the crime", and "committing the [771] crime in the commission of the same" erroneously assumes that a crime was committed and constitutes an illegal, continuous and prejudicial comment on the evidence by the court.

(e) The instruction, especially in the first paragraph, tells the jury that the act of each conspirator in a conspiracy is the act of all and is erroneous because there was no evidence to authorize a finding of conspiracy to commit the crime charged before the commission thereof and there was no evidence to authorize a conviction of defendant unless he was present and participating in the crime charged. The jury in following this instruction and that part of the Instruction No. 4 which requires that defendant be actually present undoubtedly mislead the jury into concluding that if there was a conspiracy, the act of one conspirator was the act of all, and that the words "actually present" in Instruction No. 4 were satisfied by the presence of any of the other named conspirators.

(f) The Court by charging in the third paragraph that "When a crime is actually committed by one or more persons and another person is actually present, and knowing of the felonious purpose and intent of the person or persons committing the crime, *he knowingly and intentionally aids, abets, assists or encourages*" the person or persons committing the crime that such person is equally guilty with the person who commits the crime is erroneous because it assumes that mere [772] presence with

knowledge of the intent of the person or persons committing the crime is enough. It does not clearly require participation in the crime itself and thereby assumes a disputed fact and invades the province of the jury.

16. That the Court erred in giving and reading Instruction No. 16 in that the court states in paragraph 2:

"If the Jury does not believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury should entirely disregard such statement in arriving at your verdict", as the use of the term "claimed to be a confession made by the defendant" is ambiguous, indefinite and a comment on the evidence.

This paragraph of the instruction is further erroneous in that it uses the word "should", thus giving the jury an improper norm, and aggravates this misleading concept of the law by using the word "must" in paragraph 3 of Instruction No. 6, thus implying that the Court lays varying degrees of importance to different sections of the instructions.

17. That the Court erred in giving and reading Instruction No. 6 in that the Court states in paragraph No. 3:

> "If, however, the jury does believe that a statement, written or oral, and claimed to be a confession, made by the defendant, was voluntarily [773] made by him as defined above, the jury must consider such statement and *should* give it such weight as you believe it deserves in arriving at your verdict"

as the Court again refers to the expressions "and claimed to be a confession made by the defendant", which is ambiguous, misleading, incomplete (in that it does not state who makes the claim) and a comment on the evidence.

This instruction is further erroneous since it uses the mandatory word *must*, and gives judicial direction to the jury, invades their province and is a comment on the evidence. This erroneous use of the word "must" is aggravated by the use of the word "should" in paragraph 2 and the further use of the word "should" in paragraph 3. The various uses of the words "should" and "must" in paragraphs 2 and 3 in effect indicates to the jury that the Court lays different degrees of importance and stress on different sections of the evidence and the instructions.

18. That the Court erred in overruling defendant's Motion for a Polygraph Examination, and thereby the Court and jury was deprived of the use of scientific assistance and evidence of such examination, since the defendant represented to the Court that he intended to introduce the testimony of the examiner into evidence.

19. That the Court erred in not sustaining Defendant's [774] Motion for Judgment of Acquittal at the close of the State's case.

20. That the Court erred in not sustaining Defendant's Special Motion for a Judgment of Acquittal as to murder first degree at the close of the State's case.

21. That the Court erred in not sustaining Defendant's Motion for Judgment of Acquittal at the close of all of the evidence.

22. That the Court erred in not sustaining Defendant's Special Motion for a Judgment of Acquittal as to Murder First Degree at the close of all of the evidence.

WHEREFORE, the defendant prays the Court to grant him a new trial. Respectfully submitted.

Filed
Aug. 27, 1955
Clarence Pierce
Circuit Clerk.

And thereafter to-wit: On the same day, the following order was entered of record:

Miscellaneous Record, Circuit Court, Butler County, Missouri Saturday, August 27th, 1955, In Recess, (Book 10, page 477)

Now on this 27th day of August, 1955, comes the defendant herein, by counsel Mark Murray Hennelly, and files his Motion for New Trial in this cause.

[775] And thereafter to-wit: On the 13th day of September, 1954, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 488) Tuesday, September 13th, 1955, Regular July 1955 Term

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Now on this day, Motion for New Trial having been filed in this cause, cause is set for October 3rd, 1955, for disposition of the Motion and for such further orders in accordance therewith as necessary.

The Sheriff is ordered by the Court to produce the defendant, James William Stidham, from the State Penitentiary for appearance in Court.

And thereafter to-wit: On the 3rd day of October, 1955, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 510-511) Monday, October 3rd, 1955, Regular October 1955 Term

Now on this same date, comes James T. Riley, Prosecuting Attorney of Cole County, Missouri for the State and the defendant, James William Stidham, in person and in open Court and there also appears F. Neil Aschmeyer, Attorney at Law, St. Louis, Missouri, who states that he is an associate of Mark Hennelly, attorney for the defendant, previously appointed by the Court (Circuit) of Cole County, Missouri, [776] prior to the granting of the change of venue to this Court, and who represented the defendant in the trial of this case, and no objection being made by the defendant as to matters of representation, and the defendant being represented by F. Neil Aschmeyer, the Court now informs the defendant that he has been tried by a jury of Butler County, Missouri, and found guilty of the crime of Murder in the First Degree under an indictment against him and that his punishment was fixed at imprisonment in the State Penitentiary during his natural life, and being now asked by the Court if he has any legal cause to show why judgment should not be pronounced against him according to law, and still failing to show such cause, it is therefore sentenced, ordered and adjudged by the Court that the said defendant James William Stidham having been found guilty as aforesaid, be confined in the Penitentiary of the State of Missouri for the period of his natural life, and that the Sheriff of this County shall without delay remove and safely convey the said defendant to the said Penitentiary there to be kept, confined and treated in the manner directed by law and the Warden of said Penitentiary is

required to receive and safely keep him, the said defendant, in the Penitentiary aforesaid until the judgment and sentence of the Court herein be complied with, or until the said defendant shall be otherwise discharged by due course of law.

It is further considered, ordered and adjudged by the [777] Court, that the State have and recover of said defendant the costs in this suit expended, and that hereof execution issue therefor.

And thereafter to-wit: On the 3rd day of October, 1955, a Motion to Appeal as a Poor Person was filed, which Motion reads in words and figures as follows:

MOTION TO APPEAL AS A POOR PERSON

Comes now the defendant, James W. Stidham, and respectfully represents and shows this Honorable Court that he is a pauper within the meaning of the law.

I.

Defendant further represents and shows that he has been convicted of Murder in the First Degree, and that he is aggrieved by said conviction, and desires to take an appeal, but that he has no money to pay costs for said appeal, nor to pay for bill of exceptions. That he has been advised by counsel that he has a good and meretricious cause to take appeal.

II.

Your defendant further represents and states that he will be denied the right to take an appeal unless this Honorable Court sustains this motion. He is without friends or relatives from whom he can get money to pay said expenses.

WHEREFORE, and because of the premises, this defendant [778] prays that his motion to sue as a poor person be sustained.

Filed
Oct. 3, 1955
Clarence Pierce
Circuit Clerk.

And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 511) Monday, October 3rd, 1955, Regular October 1955 Term

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Now on this same date, comes the defendant herein, in person and by counsel, and leave of Court first had and obtained, files his Motion to Appeal as a poor person. Said Motion is taken up and heard and considered by the Court, and this cause is passed at this time for further testimony or for orders herein.

And thereafter to-wit: On the same day, a Notice of Appeal was filed, which Notice of Appeal reads in words and figures as follows:

STATE OF MISSOURI)
) SS.
COUNTY OF BUTLER)

IN THE
CIRCUIT COURT WITHIN AND FOR SAID BUTLER COUNTY, STATE OF MISSOURI

[779] STATE OF MISSOURI,)
Plaintiff,)
vs.) No.
JAMES W. STIDHAM,)
Defendant.)

Charge: Murder First Degree

NOTICE OF APPEAL

NOTICE is hereby given that the defendant, James W. Stidham, hereby appeals to the Supreme Court of Missouri from the judgment of conviction of Murder First Degree entered against him in this Court in this cause on the 20th day of July, 1955; under said judgment defendant was sentenced to Life Imprisonment.

/s/ Mark M. Hennelly
Attorney for Defendant
Mark M. Hennelly
1832 Arcade Building
St. Louis 1, Missouri
CHestnut 1-2242

On this 3rd day of October, 1955, I duly filed the within notice in the records of this court and on this 3rd day of October, 1955, served a copy thereof upon the Prosecuting Attorney of Cole County, Missouri, and

Butler County, Missouri, and mailed additional copies as follows:

Clarence Pierce, Clerk
By: /s/ Eula Mae Adams

Filed
Oct. 3, 1955
Clarence Pierce
Circuit Clerk.

[780] And thereafter to-wit: On the same day, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 62, page 511) Monday, October 3rd, 1955, Regular October, 1955 Term

Now on this same date, comes the defendant herein, in person and by counsel, leave of Court first had and obtained, and files his Application and Notice of Appeal in this cause to the Supreme Court of Missouri.

And the Court having seen said Application and Notice of Appeal, and being now fully advised in the premises, does make the order that said Appeal be granted to the Supreme Court of Missouri.

It is ordered by the Court that the defendant herein be committed in accordance with the Sentence and Judgment of the Court.

And thereafter to-wit: On the 8th day of November, 1955, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 63, page 5) Tuesday, November 8th, 1955, Regular October 1955 Term

Now on this 8th day of November, 1955, Motion to Appeal as a Poor Person is filed in this cause and is taken up and submitted to the Court. And the Court having seen said [781] Motion, and being now fully advised in the premises, does make the order that said Motion to Appeal as Poor Person be and the same is hereby sustained.

And thereafter to-wit: On the 3rd day of January, 1956, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 63, page 50) Tuesday, January 3rd, 1956, Regular January 1956 Term

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Now on this day the defendant herein is granted by the Court an additional ninety days to file transcript on appeal in this cause.

[782] STATE OF MISSOURI)
) SS
COUNTY OF BUTLER)

I Leonard W. Ehlers, hereby certify that I was the reporter in the Circuit Court of Butler County, Missouri, 33rd Judicial Circuit, Poplar Bluff, Missouri, in which the foregoing case was tried; that I prepared the foregoing transcript of the record under an order of the court permitting the defendant to perfect his appeal as a poor person and that there is due and owing me the sum of $469.80 for an original and 1 copy, the cost of the original at 45¢ per page being $352.35, and 1 copy at 15¢ per page being $117.45, or a total of $469.80.

/s/ Leonard W. Ehlers
Leonard W. Ehlers,
Official Court Reporter,
33rd Judicial Circuit,
Poplar Bluff, Mo.

STATE OF MISSOURI)
) SS
COUNTY OF BUTLER)

I, Clarence Pierce, Clerk of the Circuit Court, Butler County, Missouri, do hereby certify the annexed to be the typewritten transcript of the record filed on the 25th day of May, 1956, in Cause No. 3158 of the causes of this court, wherein the State of Missouri is Plaintiff [783] James William Stidham is the defendant, as fully as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Poplar Bluff, Missouri, this 25th day of May, 1956.

/s/ Clarence Pierce
Clerk, Circuit Court
By: /s/ Eula Mae Adams
Deputy Clerk

Approved:
/s/ Mark M. Hennelly
Attorney for Appellant
/s/ James T. Riley
Attorney for Respondent

APPENDIX B—Transcript in: State v. Stidham,

No. 52406

[1] IN THE
CIRCUIT COURT WITHIN AND FOR THE COUNTY OF BUTLER, STATE OF MISSOURI

STATE OF MISSOURI	)	
Plaintiff,	)	
vs.	)	No. 3158
JAMES WILLIAM STIDHAM,	)	
Defendant.	)	

SUPPLEMENTAL TRANSCRIPT

(Filed September 21, 1966)

And thereafter to-wit: On the 7th day of June, 1966, Defendant herein, by counsel Pro-Se, files Motion to Vacate Judgment and Sentence, which Motion to Vacate Judgment and Sentence, reads in words and figures as follows:

Motion to Vacate Judgment and Sentence

Pursuant to the provisions contained in Missouri Supreme Court Rule 27.26, Movant respectfully moves the Honorable Court to vacate and hold for naught the judgment and sentence herein, and as reasons therefor, states:

FACTS INVOLVED

On September 22, 1954, movant was an inmate of the Missouri State Penitentiary serving a sentence of twenty-five years for armed robbery. On the above date he was detained in a section of the prison referred to as Death Row; among others, Rollie Laster, James M. Creighton, and Walter Lee Donnell were also detained on Death Row

for various reasons; [2] and at approxiamtely six P.M. on the above date, a full scale riot occurred in said prison; Death Row was broken into, movant and Laster was released therefrom, and during the riot Donnell was allegedly murdered.

The riot supra, was quelled on September 23, 1954, at seven AM, and on said date, William DeLapp, William R. Hoover and Jackie Lee Noble signed statements for members of Missouri Highway Patrol and St. Louis Policemen admitting complicity in the aforesaid murder, and therein accused movant as the principal to the murder. On the above date movant was questioned by the aforesaid officers about the murder supra, thereupon he denied any complicity or knowledge of said murder.

On September 24, 1954, movant was questioned several times by various officers relative to said murder, and at each interrogation he denied any knowledge or complicity of said murder. On the above date, movant wrote a letter addressed to his parents asking them to immediately visit him with an attorney, enough postage was placed on said letter to register it, but the letter was not allowed to leave the prison.

From September 23, 1954, till September 27, 1954, movant was held incommunicado, was questioned at least twenty-six times by relays of Missouri Highway Patrolmen and St. Louis Policemen, and at each interrogation, movant denied any [3] knowledge of the aforesaid murder. The first time movant was interrogated, he was in good health, and weighed 184 pounds.

On the morning of September 27, 1954, Paul Edward Kenton, and Rollie Laster signed confessions to the murder supra, and therein named movant as a participant to the aforesaid murder.

Subsequently, and momentarily thereafter, a St. Louis Policeman, and a Missouri Highway Patrolman came to movant's cell on Death Row, handcuffed his hands to his back, placed him in a patrol car, and drove him a quarter of a mile to a lonely and isolated spot known as the "field house". Whereat other Missouri Highway Patrolmen and St. Louis Policemen were holding an accusatory session. Immediately upon arrival at said field house, movant was specifically accused of the murder supra, by the aforesaid officers. The aforesaid officers wore sidearms, were armed with riot guns, and despite it being such a hot day that the aforesaid officers had been directed to remove their coats and work in their blouses, Movant's arms remained handcuffed behind him until he agreed to write a statement admitting complicity in the aforesaid murder. After being accused for approximately thirty minutes, Movant agreed to write a statement, whereupon the handcuffs were removed; *he was not advised of his Constitutional Rights to remain silent, or his Constitutional Rights to Counsel, or that any statement he made might be used against him.* [4] Sergeant Percy Little of the Missouri Highway Patrol dictated portions, if not all of the contents of the aforesaid statement or confession. The confession gave movant's name incorrect, gave his residence incorrect, his past record incorrect, misspelled the name of Creighton, and did not dovetail with any material evidence that was later introduced at movant's trial. (Movant later introduced evidence and testimony to the effect that he was tortured by the aforementioned officers into making a confession, but since this was contradicted by the State, Movant herein relies exclusively upon undisputed testimony and evidence to secure relief.)

After the aforesaid confession was obtained, Movant was lodged in O-Hall until September 29, 1954. He was not

given food or water, he was not accessible to friends, relatives, or attorney, and a Catholic Priest was specifically denied permission to visit Movant because he was too badly beaten and bruised according to the opinion of Missouri Highway Patrolmen.

On the morning of September 29, 1954, Movant was escorted to the Cole County Magistrate Court for arraignment on the information charging first degree murder in the death of Walter Lee Donnell. Movant had already been threatened by the aforesaid officers that he had better waive preliminary hearing at said arraignment. Then, immediately before [5] arraignment Movant requested to phone an attorney but was refused this right by Foster R. Wheatley, Cole County Magistrate Judge, thereupon Movant shouted out and asked if an attorney was present in the Court room, James T. Riley, Cole County Prosecutor, commanded Movant to remain silent— Consequently, Movant was not allowed to contact counsel.

Immediately thereafter, Movant was transported to Springfield, Missouri, and lodged in the U. S. Medical Center. Upon entry there, Movant was examined by Doctors, said examination revealed that Movant weighed 159 pounds, his left hand and arm was paralyzed, and his body was a mass of bruises, which Movant stated was the result of torture inflicted upon him by Missouri Highway Patrolmen and St. Louis Policemen. Movant was held incommunicado for several days at Springfield.

In due course, Movant was arraigned in the Cole County Circuit Court at Jefferson City, Missouri.

Movant's attorney, Mark M. Hennelly, filed a written motion to Suppress the aforesaid confession for the reason that it was not voluntary, was the product of coercion, torture, was made in violation of his constitutional rights,

and he was denied counsel at the time said confession was made. The Motion to Suppress was denied.

Subsequently, Movant secured a change of venue and his trial site was moved to Poplar Bluff, Missouri.

During said trial, Herman Trout and James M. Creighton, [6] both convicts of the Missouri State Penitentiary, and principal State witnesses, testified that representatives of the State had not offered them any consideration or inducements for their testimony, whereas, both of them had been promised, and subsequently received their freedom in exchange for their testimony. Both of these witnesses gave perjured testimony that will be more fully developed hereinafter.

The admissibility of the confession supra, was objected to out of the hearing of the jury, as well as in the presence of the jury. Said objection was predicated upon the U. S. and Missouri Constitutions. Said objection was overruled, and in the absence of a finding, or ruling by the trial Judge that said confession was voluntary, the confession was admitted into evidence, and the jury was instructed to determine the voluntariness of said confession. Thereafter, without movant being present, and in the absence of his counsel, the jury retired for deliberation, and subsequently returned a guilty verdict with a life sentence recommendation.

Movant's Contention

It is the contention of your movant and he alleges that the within conviction and sentence is contrary to the fifth, sixth, and fourteenth amendments to the United States Constitution, and violates the commands embodied in the Missouri Constitution, in that:

[7] (1) The confession supra, was the exclusive product of coercion used and practiced upon Movant by members of the Missouri Highway Patrol, and St. Louis City Policemen, in that:

A. Movant was held incommunicado prior to making the confession, and,

B. Movant was expressly denied the assistance of counsel prior to giving the aforesaid confession, and,

C. At the time of the confession supra, was made, the *accusatory stage had been reached,* and it was incumbent that Movant be afforded his Constitutional rights to counsel, and,

D. Movant was protractedly, and intensely interrogated twenty-six times by relays of officers during the five day period before a confession was obtained, and,

E. Movant was taken to a distant, lonely, and isolated place where the confession was obtained, and,

F. Movant's hands were handcuffed behind his back, and numerous officers armed with sidearms and riot guns had movant encircled until the moment a confession was made, in the gruelling atmosphere of the hot day, and,

G. After the confession supra, the treatment inflicted upon Movant, as hereinabove outlined, and hereinafter elucidated, invalidates said confession, and,

H. The trial judge committed Constitutional error by failing to make a specific finding that said confession was [8] voluntary, but submitted said question to the jury for determination. See instruction No. 6, and,

I. The *undisputed* portion of the trial evidence reflects that the confession supra, was the result of coercion, and was not the product of a free choice, and,

(2) Movant was denied the right to obtain counsel at a critical stage of the proceedings, and,

(3) The State of Missouri knowingly used perjured testimony to obtain the within conviction, and,

(4) The State of Missouri deliberately withheld and suppressed evidence that would have been favorable to Movant at his trial, and,

(5) Movant was not present, nor was his counsel, during the deliberation of the jury, and,

(6) Movant was deprived of his liberty in violation of "due process of law" for other reasons that will appear more fully hereinafter.

The Law And The Argument

Missouri Supreme Court Rule 29.01 (a) provides:

> "In every criminal prosecution in *any court* of this State, the accused shall have the right to appear and defend the same in person and by *counsel.*"

Compare Section 18, Article 1, Missouri Constitution. Rule 21.14 of the Missouri Supreme Court, provides among other things, that:

> [9] "All persons arrested and held in custody by any peace officer, without warrant, for the alleged commission of a criminal offense, or on suspicion thereof, shall be discharged from such custody within twenty hours from the time of arrest, unless they be held upon a warrant issued subsequent to such arrest. While so held in custody, every such person shall be permitted to *consult with counsel* or *other persons in his behalf.*" * * * Compare Section 544.120 R.S. 1949

Missouri Supreme Court Rule 29.05, provides:

> "Every person arrested and held in custody by any peace officer in any jail, police station or other place, upon or without a warrant or other process for the alleged commission of a criminal offense, or upon suspicion thereof, shall be permitted to consult with counsel or other persons in his behalf, and, for such purpose, to use a telephone, if one be available." Compare Section 544.170 R.S.Mo. 1949

The fifth amendment to the United States Constitution, among other things, provides:

> "* * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *"

[10] Amendment sixth to the United States Constitution, states among other things, that:

> "* * * and to have the assistance of counsel for his defense * * *"

The Fourteenth Amendment to the United States Constitution provides:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws * * *"

The uncontradicted evidence, namely, the trial transcript, will undisputedly reflect that Movant was the victim of at least twenty-six protracted and persistent interrogations conducted in relays by members of the Missouri State Highway Patrol and St. Louis City Policemen; he had been held incommunicado for five days and denied the right to consult or contact counsel and relatives before a confession was obtained.

See Rech v. Pate, 81 S. Ct. 1541, and cases cited therein, where the United States Supreme Court condemned and held it contrary to the Constitution for a confession to be obtained and used under the circumstances as hereinabove outlined.

See also:

[11] Columbe v. Connecticut, 81 S. Ct. 1863
Lee v. State of Miss. 68 S. Ct. 300
Haley v. Ohio, 68 S. Ct. 302
Lyons v. Oklahoma, 64 S. Ct. 1208

In Ward v. State of Texas, 62 S. Ct. 1139, the United States Supreme Court stated:

> "This court has set aside convictions upon confessions extorted from ignorant persons who have been subjected to *persistent and protracted* questioning, or who have been held *incommunicado without advice of counsel or friends,* or who have been taken into lonely and isolated places for questioning. *Any one of these grounds would be sufficient cause FOR REVERSAL.*"

The circumstances surrounding Movant's confession, and the facts set forth in Ward v. Texas supra, are almost identical in every respect, with the exception that Movant was an inmate of the penitentiary, he was escorted to a lonely spot, and place of isolation in the prison, his hands and arms were handcuffed behind him, he was surrounded by officers armed with pistols and riot guns, and the weather was so hot that the officers had been instructed to remove their jackets, and proceed in their blouses.

Where the undisputed evidence shows that a citizen has denied complicity in a crime at least twenty-six times, [12] has been held incommunicado several days, and while in good health, is taken to a lonely isolated place behind

prison walls where a confession is obtained, and thereafter, on the same day, it is the officers' opinion that Movant's body is too badly beaten for a priest to visit him, his hands and arm becomes paralyzed, and his body weight decreases, don't these undisputed facts make the conclusion, irresistible that said confession was not the product of a free choice, but was the fruits of numerous types of coercion superimposed upon Movant by members of the Missouri State Highway Patrol, and St. Louis City Policemen.

This Honorable Court is invited to examine the decision of the United States Supreme Court in Lisenba v. California, 62 S. Ct. 280, wherein that Honorable Court said:

> "We have not hesitated to set aside convictions based in whole upon confessions extorted in graver circumstances. These were secured by *protracted* and *repeated* questioning of ignorant and untutored persons in whose minds the power of officers was greatly magnified, who sensed the adverse sentiment of the community and the danger of mob violence, who have been held *incommunicado, without the advice of friends or counsel*; some who have been taken by officers at night from the prison into *dark and lonely places* for questioning. And Due Process of [13] Law, preserving for by our Constitution Commands that no such practice as that disclosed by this record shall send any accused to his death." (Italics supplied.)

At Page 602 of the trial Court's transcript, the following colloquy transpired:

> (Redirect examination of Defendant)
> Q. Did they continue to question you while you were in that position?

A. Yes, sir, they did. They didn't question me, *they accused me.*

Prior to the hour Movant's confession was obtained, his five co-defendants had signed statements which indicated that Movant was a principal participant in the murder supra. The first of these statements were made by William DeLapp on September 23, 1954, then William R. Hoover, then Jackie Lee Noble, then Paul Edward Kenton, and then Rollie Laster. Consequently, and in view of Movant's denial of any complicity in the murder during the previous twenty-six interrogations, and by reason of the above co-defendant's statements, the aforesaid officers became convinced in their opinion that Movant was guilty, and at the final session held at the field house supra, where Movant's confession was obtained, he was not questioned, but was specifically accused of the aforesaid murder, as the above undisputed testimony reflects.

Therefore, it is the contention of your Movant and he respectfully alleges that on September 27, 1954, at the session in the field house at the Missouri State Penitentiary, the *accusatory* stage then and there began, and he was actually tried and convicted the moment the confession was obtained, and was thereby deprived of his liberty without Due Process of Law for the reason he was not afforded his Constitutional Rights to Counsel; but had theretofore been denied and deprived of the assistance of Counsel.

When the accusatory stage supra, had been reached, it was Constitutionally prerequisite that Movant be allowed the aid and advice of Counsel, and when he was deprived of this sacred right, the confession supra, became coercive in nature, and any conviction predicated thereon is void ab initio, violates "Due Process of Law", and entitles Movant to his release from prison.

A full and complete answer was recently given to the above situation by the United States Supreme Court in the widely publicized case of Escobedo v. Illinois, 378 U. S. 478. In that landmark decision, the Court examined the concept of a "Criminal Prosecution" within the meaning of the Sixth and Fourteenth Amendments and explored its initial boundaries. The Court rejected the sterile notion that a criminal prosecution, with the attendant right to Counsel, does not begin until the initation of formal judicial proceedings. Rather, [15] reaffirming its functional approach to the interpretation of the Sixth Amendment, the Court determined that a criminal prosecution begins when a person stands accused of a crime by the *forces of the State.* That point is reached, the Court said, ". . . when the process shifts from the investigatory to accusatory - - - when its focus is on the accused and its purpose is to elicit a confession. . ." 378 U. S. at 492, at that point, the adversary system begins to operate against the accused, and his right to counsel comes into play.

In *People* v. *Dorado,* 62 Cal. 20, 338, 354, 398 P. 20361, 371, the California Supreme Court recently interpreted Escobedo correctly, when it said:

> "Only when the investigatory stage has become an *accusatory* one, that is, when it has begun to focus on a *particular suspect,* the suspect has been taken into police custody, and the police have carried out a process of interrogations that lends itself to eliciting incriminating statements, does the doctrine of Escobedo apply and the confession given without the required warning or other clear evidence of waiver become inadmissible evidence."
> (Italics supplied.)

The result in Escobedo followed inexorably from a series of cases in which the United States Supreme Court

took a functional rather than a formalistic approach to the [16] "right-to-counsel" issue, beginning with *Powell* v. *Alabama*, 287 U. S. 45, and continuing to *Massiah* v. *United States*, 377 U. S. 201. In *Powell*, the Court held that an accused in a capital case "requires the guiding hand of counsel at every step in the proceedings against Him", including a stage sufficiently before trial to give the lawyer time for adequate preparation of the defense. At 287 U. S. 59, 69. In Hamilton v. Alabama, 368 U. S. 52, 54, the court held that "every step in the proceedings" against the accused included arraignment, for that was "a critical stage in a criminal proceeding. What happens there may affect the whole trial."

White v. *Maryland*, 373 U. S. 59, and Massiah v. United States, 377 U. S. 201, directly compelled the result in *Escobedo*—unless Constitutional rights were made to hinge on distinctions devoid of substance. In *White*, the court held that a guilty plea entered at a preliminary hearing in the absence of counsel was inadmissible at trial, and surely no significant distinction can be drawn between an uncounseled confession given to a judge in open court and one given to the Police in a secret penitentiary field house interrogation. In *Massiah*, the court assured the right to counsel during police interrogation after indictment, thereby erasing the line between judicial and extrajudicial proceedings in determining the stages at which an accused is entitled to legal aid and advice. The court there (377 U. S. at 204) relied [17] upon the sound reasoning of Mr. Justice Stewart's concurring opinion in Spano v. New York, 360 U. S. 315, 327:

> "Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly Courtroom, presided over by a judge, open to the public, and protected by all procedural safeguards of the law. Surely

a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station."

After Massiah, the only remaining question was whether a line drawn between police interrogations before and after indictment was rational. Such a line had already been criticized by the Chief Justice of California as "formalistic". *People* v. *Garner*, 57 Cal. 2d 135, 160, 367 P. 2d 680, 695 (Fraynar F., Concurring). And Mr. Justice Douglas joined by the Chief Justice, Mr. Justice Black and Mr. Justice Brennan, had argued such a distinction because "what takes place in the secret confines of the police station may be more critical than what takes place at the trial." *Crocker* v. *California*, 357 U. S. 433, 444-445.

In *Escobedo*, the question was laid to rest; the Court rejected a distinction between interrogation of an accused before and after formal indictment as not "meaningful". 378 U.S. 486.

[18] Not only is Escobedo firmly grounded in precedent, it is also firmly grounded in the underlying principle that "ours is the accusatorial as opposed to the inquisitorial system" of justice. *Watts* v. *Indiana*, 338 U. S. 49, 54. The doctrine of *Escobedo* is necessary to prevent law enforcement officers from circumventing the safeguards of the accusatorial, adversary trial. The facts of the present case demonstrate that necessity. Indeed the evils of the inquisitorial system come to mind as we visualize Movant's secret detention for five days of questioning and recall Mr. Justice Frankfurter's reference in *Watts* v. *Indiana* to "the practices borrowed by the Star chamber from the continent whereby an accused was interrogated in secret for hours on end." Ibid.

Movant's plight from September 23, 1954, to September 29, 1954, demonstrates why the right to counsel would

indeed be "a very hollow thing" (In re Graban, 352 U. S. 330, 344, (Black, J., dissenting) if it were not afforded until after the police chose to take a suspect before a Magistrate to be formally charged. For Movant, just as Danny Escobedo, the right to a lawyer at the pleading or trial stage was a right of little worth; he had already lost his case in a secret pre-trial proceeding in a lonely isolated Field House at the Missouri State Penitentiary. The State emerged the clear winner of this contest after six days. Movant armed with a meagre education, deprived of the right to contact his family [19] and/or attorney, surrounded by officers armed with pistols and riot guns, his arms cuffed behind him on a "hot day" until he agreed to write a confession and incriminate himself, hardly provided the challenge that is "the essence of our adversary system".

Without the "guiding hand of counsel", Movant was no match for the adversary power represented by the officers assembled in the Field House at the Missouri State Penitentiary on September 27, 1954, a power doubtless exaggerated by Movant's prolonged incommunicado detention, and his futile denials during twenty-six prior interrogations. Movant faced his accusers and interrogators *alone*. There was no one to advise him how to remedy the flagrantly illegal conduct of the police in holding him incommunicado; there was no one to advise him that the police had no legal power to compel him to talk; there was no one to advise him of the consequences of the answers he might give. There was no one, for example, to tell him that the confessions made by his co-defendants were not binding upon him, nor could they be used against him in a court of law.

The proceedings against Movant had reached "*The accusatory stage*" by the time his confession was elicited.

This is apparent from the above undisputed testimony, and the fact that the police had obtained confessions from five co-defendants implicating Movant.

[20] In Escobedo, three circumstances were cited to show that the accusatory stage had been reached: (1) "The investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect;" (2) "The suspect has been taken into police custody;" (3) and, "The police carry out a process of interrogations that lends itself to eliciting incriminating statements". 378 U. S. at 490-491. Movant's position at the time of his confession is indistinguishable from Escobedo's. Here, as in Escobedo, the State clearly proceeded to the "accusatory stage" and Movant was Constitutionally entitled to the assistance of counsel.

By the time Movant was taken to the Field House at the Missouri State Penitentiary, he had, for all practical reasons and purposes, been charged with murder of Walter Lee Donnell. Compare Escobedo v. Illinois, 378 U. S. 478, 486. He was told by the officers his five co-defendants had already signed confessions implicating him. Danny Escobedo was in custody perhaps five hours before his confession was elicited; Movant had been held incommunicado for five days, and had denied all complicity in the murder during twenty-six prior interrogations protractedly and persistently conducted by relays of officers.

As in Escobedo, the officers were obviously out to "get" Movant to confess his guilt. There is no indication in [21] the trial court transcript of trial that he was not required to answer their accusations, they led him to believe they had the "goods" on him and confronted him with the confessions of his co-defendants. This was not general questioning intended to give Movant an opportunity to ex-

plain suspicions of the circumstances. See Gallegas v. Nebraska, 342 U. S. 55, 71.

Many Courts have rendered decisions predicated upon Escobedo, and this Honorable Court is respectfully invited to examine the following cases regarding the same:

United States ex rel. Russo v. New Jersey, (C.A. 3) 351 F. 2d 429, 437
Collins v. Beto, 348 F. 2d 823, 830 (C.A. 5)
Wright v. Dickson, 336 F. 2d 878, 882 (C.A. 9)
U. S. ex rel. Netters v. Rundle, 246 F. Supp. 540, 542
U. S. ex rel. Kemp v. Pate, 240 F. Supp. 696, 707
Galarza Cruz v. Delgado, 233 F. Supp. 944, 948
People v. Dorado, 62 Cal. 2d 338, 398 P. 2d 361
State v. Hall, 88 Id. 117, 129-31, 397 P. 2d 261
State v. Neely, 239 Ore. 487, 500-63, 398 P. 2d 482
State v. Dufour, 206 A. 2d 82, 85 (R.I.)

After a hearing outside the presence of the jury on the question of whether the confession supra, was voluntary, the trial judge failed to rule specifically on the voluntariness of said confession, but made it a jury question, and delivered the following instruction. (No. A6)

[22] "The Court instructs the jury that before any alleged statement can be valid, and before you can even consider it, it must have been made voluntarily, that is to say, without anyone having offered to the person who is claimed to have made such statement any hope of leniency or reward of any kind for making such statement, and without anyone making any threat or doing any violence to the person claimed to have made any such statement in order to induce or coerce him to confess.

If the jury does not believe that a statement, written or oral, and claimed to be a confession made by the

defendant, was voluntarily made by him as defined above, the jury should entirely disregard such statement in arriving at your verdict.

If however, the jury don't believe that a statement, written or oral, and claimed to be a confession made by him as defined above, the jury must consider such statement and you should give it such weight as you believe it deserves in arriving at your verdict."

A full and complete objection was made to the above instruction, and overruled by the trial court.

In Jackson v. Denno, 378 U. S. 368, the United States Supreme Court condemned the above procedure and instructions, and pointedly stated that the above practice used in *Missouri* [23] *Courts* is contrary to the Constitution, and violates due process of law.

At the trial of Movant, his counsel repeatedly objected to the introduction of the aforesaid confession. Said objections were predicated upon the provisions contained in the United States Constitution, and Constitution of Missouri.

When Movant appeared before the Cole County Magistrate Court on September 29, 1954, he immediately requested, and was refused the right to phone an attorney. Thereupon, he shouted out in the Court room and inquired if an attorney was present. James T. Riley, prosecutor, and Foster S. Wheatley, Magistrate Judge, demanded that Movant shut up. When Movant persisted in his efforts to contact counsel at that instant, a Missouri Highway Patrolman placed a gun at Movant's head and demanded silence.

Momentarily thereafter, Movant was chained and shackled and shanghaied to Springfield, Missouri, and

lodged in the U. S. Medical Center where he was held incommunicado for several days.

Movant was manifestly prejudiced by the denial of his Constitutional Right to phone an attorney at the arraignment supra, for the reason he was shanghaied one hundred and sixty miles away from the locus delicti, and held incommunicado; whereas, if he had been allowed to secure the assistance of counsel at the arraignment supra, additional, valuable time would [24] have been allotted to prepare his defense. That is to say, at the very period that Movant was being held incommunicado, his counsel could have utilized said incommunicado period in the preparation of Movant's defense. Furthermore, when these shocking facts are viewed in conjunction with the undisputed, barbaric treatment superimposed upon Movant immediately after the confession supra, was secured, and while he was in O-Hall, it clearly depicts a full and complete picture of the callous treatment inflicted upon Movant by representatives of the State of Missouri *prior* to said confession.

In Haley v. Ohio, 68 S. Ct. 302, it was stated in no uncertain terms that such callous treatment after a confession must be viewed in connection with what is alleged to have occurred *prior* to the signing of a confession. That is to say, if the officers supra, would deny Movant food, water, and refuse to allow a priest to visit him immediately *after* the confession was made, the imagination don't have to be stretched an iota to assume what these officers resorted to *before* the confession was made. The same train of reasoning applies to Cole County attorney, James. T. Riley, and Foster S. Wheately, Cole County Magistrate Judge, when they flagrantly and belligerently refused Movant the Constitutional right to contact and secure counsel. What was the State of Missouri trying to con-

ceal when they refused Movant the Constitutional right to contact and secure counsel, and refused a humble [25] priest permission to visit Movant in O-Hall. The answer stands out like cancer on our concept of fairness and due process of law. They didn't want anyone to view Movant's physical condition. The same suggestion applies to the aforesaid denial of the right to see an attorney at the arraignment.

It is a well established principle of law, that an accused is entitled to the assistance of counsel at each and every step of the proceedings against him, or he is deprived of his liberty without Due Process of Law, and must be discharged from imprisonment.

For a most recent decision on this proposition, see Hamilton v. State of Alabama, 368 U. S. 52, wherein the United States Supreme Court emphatically stated that to deny the accused the assistance of counsel at *arraignment*, is a denial of Due Process of Law.

This Honorable Court is thoroughly familiar with the numerous decisions that uniformly and unanimously held that the accused is entitled to the assistance of counsel at *each* and *every* step of the proceedings had against him. Therefore, without quoting therefrom, Movant hereinbelow cites several decisions which fully supports the above proposition, and might assist this Honorable Court in arriving at a decision. See:

[26] Powell v. Alabama, 287 U. S. 45
Johnson v. Zerbst, 304 U. S. 458
Gideon v. Wainwright, 372 U. S. 335
Uveges v. Pennsylvania, 335 U. S. 437

James M. Creighton, and Herman Trout, inmates of the Missouri State Penitentiary at the time of the murder supra, and the principal witnesses for the State at the

time of Movant's trial, testified that they had not been promised any reward or other consideration for their testimony. Whereas, in truth and fact, the aforesaid James T. Riley, and E. V. Nash, of the Missouri Highway Patrol, had therefore promised, and thereafter did secure their release from prison in exchange for their testimony.

In *Napue* v. *Illinois,* No. 583 October Term, 1958, the United States Supreme Court stated that the above line of testimony by the State, constituted deliberate use of perjured testimony, that is inadmissible, and entitles the petitioner to his release.

It is respectfully submitted that the Court's reasoning in Napue is just as applicable to Movant today, as it was the day it was rendered.

Movant avers and alleges that the State of Missouri unlawfully withheld substantial evidence that would have been valuable to Movant at his trial.

That is to say, the aforesaid *Herman Trout* testified [27] that the water from Death Row *could not* be turned off from *inside* B & C Basement. This was essential testimony because Trout had theretofore testified that he had turned off the water for Death Row, and *thereafter* observed Movant himself at a wash basin, washing in Death Row.

Richard Gonzales, a former inmate of the Missouri State Penitentiary, and a constant companion of the aforesaid Trout, the night of the alleged murder, gave investigating officers a statement declaring that Trout spent the night in a sub-basement to Death Row the night of the riot, and therefore it was humanly impossible for Trout to observe what he testified to at Movant's trial. This evidence was also deliberately suppressed and withheld by counsel for the State.

James M. Creighton supra, testified that he personally knew William De Lapp, William R. Hoover (co-defendants), prior to the aforesaid murder. However, prison authorities, and counsel for the State, was well aware that Creighton could not have been acquainted with De Lapp and Hoover, because at the time of their birth Creighton was a prisoner at the Missouri State Penitentiary; upon their arrival here, Creighton was in the State Hospital at Fulton, Missouri, and subsequently detained in Death Row. At no time prior to the alleged murder did Creighton have any kind of contact with De Lapp or Hoover, therefore, it was impossible for him to be acquainted with [28] either. Yet, his testimony established a conspiracy between Movant and De Lapp; and his testimony in this respect had a tremendous impact upon the Jury. Counsel for the State of Missouri was well aware of the above, but suppressed it from Movant's counsel, and thereby caused him to be deprived of his liberty without Due Process of Law.

It has been held many times that the deliberate suppressing of evidence favorable to the accused is contrary to the commands embodied in the Constitution, and a conviction resulting therefrom cannot stand.

All of the modern Court decisions state that a defendant must be present at each and every stage of the proceedings of a trial, and must be represented by counsel at every step of the trial, otherwise, any conviction resulting therefrom is contrary to the Due Process clause, and his conviction is a nullity.

Movant alleges and contends that the most vital and crucial stage of a criminal trial is the deliberations of the Jury, and he is entitled to be personally present, and be represented by counsel during said deliberations; otherwise his conviction violates due process of law.

This is a novel proposition, and even in the enlightening period, Movant has been unable to locate a decision wherein this issue has been adjudicated by any court in America.

It is the contention of your Movant and he respectfully [29] alleges that all of the above allegations makes his detention contrary to the United States Constitution, and decisions rendered thereunder, and it is hereby requested that this Honorable Court rule on the *Federal* questions herein involved.

CONCLUSION

It is respectfully submitted that in September 1954, and the months to follow, the population of Missouri was prejudiced against Movant because of the ten million dollar destruction to the State Penitentiary, the news media was so intense throughout the State that it was impossible to receive a fair trial; and a mere information alone would have brought about the conviction of any inmate of the Missouri State Prison at that time. Movant was accused, charged, and convicted in an atmosphere of hatred, and public sentiment that prevented Movant from receiving the fair trial he was entitled to.

However, this is a very enlightened period, and this Honorable Court is not required to sit back on its haunches and allow the within judgment to stand. A judgment is not rendered to import historical knowledge, but it is rendered for the ..... future. That is to say, *today*, can we examine the circumstances under which the judgment supra, was rendered, and say that it don't shock our emotions deeply for a judgment to be based on the facts as hereinabove outlined.

Wherefore, it is respectfully submitted that the [30 aforesaid judgment and sentence should be vacated and held for naught.

Respectfully submitted,

James W. Stidham-Movant-Pro Se.
Box 900—Register No. 65993
Jefferson City, Missouri

VERIFICATION

State of Missouri)
) ss.
County of Cole)

James William Stidham, having been duly sworn according to law, deposes and says: That he is the Movant in the above and foregoing Motion to Vacate, he has read the contents thereof and knows the same to be true and correct to the best of his knowledge and belief.

/s/ James William Stidham

Was subscribed and sworn to before me this Jun 6, 1966.

/s/ Joseph R. Keene,
Notary Public.

My commission expires Oct. 10, 1969.

Filed
Jun 7, 1966
Paul W. Horner
Circuit Clerk.

And thereafter to-wit: On the same day, the following order was entered of record:

Miscellaneous Record, Circuit Court, Butler County, Missouri June 7th, 1966—In Recess—(Book No. 14, Page 519)

[31] Now on this 7th day of June, 1966, comes the defendant James W. Stidham, and files Motion to Vacate Judgment and Sentence in this cause.

And thereafter to-wit: On the 23rd day of June, 1966, the following order was entered of record:

Circuit Court Record, Butler County, Missouri (Book 72, Page 128) June 23rd, 1966, Regular April 1966 Term

Now on this 23rd day of June, 1966, the Court takes up the Defendant James W. Stidham's Motion to Vacate Judgment and Sentence, filed in the Circuit Court of Butler County, Missouri, June 7, 1966. The Court after a study of said Motion and all the files and records in this cause, finds that all the matters and things raised by the defendant was ably represented by counsel; that these matters were raised on appeal and defendant's conviction was affirmed at 305 S.W. 2d 7 and are now before the Supreme Court of Missouri in Case No. 50,806;

WHEREFORE, it is ordered by the Court that Defendant's Motion to Vacate Judgment and Sentence be and the same is hereby overruled and for Naught held.

It is further ordered by the Court that the Clerk send the defendant James William Stidham a copy of this order.

[32] And thereafter to-wit: On the 28th day of June, 1966, Defendant herein, by counsel Pro-Se, files Supplemental Amendment to Motion to Vacate Judgment and Sentence, which Supplemental Amendment to Motion to Vacate Judgment and Sentence, reads in words and figures as follows:

as

In re: James W. Stidham v. State of Missouri

SUPPLEMENTAL AMENDMENT TO MOTION TO VACATE JUDGMENT AND SENTENCE

Comes now James William Stidham, movant in the motion to vacate judgment and sentence now pending before this Honorable Court for consideration, and amends and supplements said motion, to-wit:

1. Movant alleges that the circumstances under which the confession supra, was made, compelled him to be a witness against himself. and,

2. Movant was denied the Constitutional privilege against self-incrimination when the aforesaid confession was used against him. and,

3. Movant was not advised of his Constitutional right to remain silent, before said confession was made. and,

4. Movant was not advised that any statement he made could be used against him. and,

5. Movant was not advised of his Constitutional right to counsel before the aforesaid confession was made; nor did he knowingly, competently, intelligently, or understandingly [33] waive said right. and,

6. At the time the confession supra, was made, movant was in actual and technical custody.

Movant alleges that the Transcript of Evidence now on file in this Honorable Court clearly reflects that movant's counsel repeatedly objected to the introduction in evidence of the confession supra, and said objections were predicated upon what is alleged in the above six paragraphs.

In Miranda v. Arizona, decided June 13, 1966, the United States Supreme Court stated in no uncertain terms

that a denial of any or all of the above constitutional provisions, make a confession involuntary and coercive; violates due process of law, and entitles the accused to his release.

Also see:
Haynes v. Washington, 373 U. S. 568
Spano v. New York, 360 U. S. 315

Wherefore, it is respectfully urged that upon consideration of the foregoing Motion to Vacate Judgment, and what is contained in this Supplemental Amendment, that the judgment and sentence of this Honorable Court should be vacated.

Respectfully submitted,

/s/ James William Stidham

County of Cole)
) ss.
State of Missouri)

Subscribed and sworn to before me this 27th day of [34] June, 1966.

/s/ Joseph R. Keene
Notary Public

My commission expires Oct. 10, 1969.

Filed
Jun 28, 1966
Paul W. Horner
Circuit Clerk.

And thereafter to-wit: On the same day, the following order was entered of record:

Miscellaneous Record, Butler County Missouri, Circuit Court, June 28th, 1966—In Recess—(Book 14, Page 536)

Now on this 28th day of June, 1966, comes the defendant herein, by counsel Pro-Se and files supplemental amendment to Motion to Vacate Judgment and Sentence in this cause.

And thereafter to-wit: On the 30th day of June, 1966, the following order was entered of record:

Miscellaneous Record, Circuit Court, Butler County, Missouri June 30th, 1966—In Recess—(Book 14, Page 538)

Now on this 30th day of June, 1966, mandate from the Supreme Court is filed in this cause.

[35] And thereafter to-wit: On the 30th day of June, 1966, the following order was entered of record:

Circuit Court Record, Butler County, Missouri, (Book 72, Page 134) June 30th, 1966, Regular April 1966 Term

---

Now on this 30th day of June, 1966, the Court takes up defendant's Supplemental Amendment to Motion to Vacate Judgment and Sentence which was filed in the Circuit Court of Butler County, Missouri, June 28, 1966. It appears to the Court that this Pleading is a Supplemental Amendment to the Motion to Vacate Judgment and Sentence which was mailed to the defendant herein. After careful consideration of this Supplemental Amendment to Motion to Vacate Judgment and Sentence, the Court does make and enter its order that said Supplemental Amendment be and the same is hereby overruled for the same reasons as set forth in the court's ruling of June 23, 1966, which are as follows:

All of the matters and things raised by the defendant in his Motion to Vacate Sentence and Judgment were before the trial court; That the defendant was ably represented by counsel; that these matters were raised on appeal and defendant's conviction was affirmed at 305 S.W.

2d 7, and are now before the Supreme Court of Missouri in Case No. 50 806.

It is further ordered by the Court that the Clerk send a copy of this order to the defendant James William Stidham.

[36] And thereafter to-wit: On the 2nd day of July, 1966, comes the defendant herein, by counsel Pro-Se, and files Notice of Appeal, Designation of Record, and Motion for Leave to Appeal in Forma Pauperis, which read in words and figures as follows:

NOTICE OF APPEAL

James William Stidham, defendant in the above entitled cause, hereby serves notice that he intends to appeal to the Missouri Supreme Court the order of this Court denying his motion of June 23, 1966,

Respectfully Submitted,

/s/ James William Stidham

Dated: July 1, 1966

cc: Marion Spicer, Clerk
Missouri Supreme Court
Jefferson City, Missouri

Norman Anderson
Missouri Attorney General
Jefferson City, Missouri

Filed
Jul 2, 1966
Paul W. Horner
Circuit Clerk.

DESIGNATION OF RECORD

The Clerk of this Honorable Court is hereby requested to prepare and transmit to the Clerk of the Missouri Supreme Court the records herein designated:

[37] 1. Motion to Vacate Judgment and Sentence.

2. Supplemental Amendment to Motion to Vacate Judgment and Sentence.

3. Order of June 23, 1966, denying Motion to Vacate Judgment and Sentence.

4. Motion for Leave to Appeal in Forma Pauperis.

5. Order allowing appeal in forma pauperis.

6. This Designation of Record and service thereon.

Said records to be prepared and transmitted to Clerk of Missouri Supreme Court pursuant to the rules of this Honorable Court.

/s/ James William Stidham

cc: Marion Spicer, Clerk
Missouri Supreme Court
Jefferson City, Missouri.

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

James William Stidham, having been first duly sworn according to law, deposes and says: That on June 23, 1966, this Honorable Court denied a Motion to Vacate Judgment and Sentence wherein it was alleged that his conviction was obtained in violation of his Constitutional Rights; defendant alleges that the aforesaid Motion to Vacate Judgment and Sentence is meritorious, made in good faith, well founded in fact and law, and that he is entitled to the redress he seeks therein, but he is without sufficient

funds to make payment for his [38] appeal to the Missouri Supreme Court.

Wherefore, defendant prays for leave of this Honorable Court to appeal the within matter in forma pauperis, and without payment therefor.

Respectfully Submitted,

/s/ James William Stidham

County of Cole)
) ss
State of Missouri)

Subscribed and sworn to before me this Jul 1, 1966.

/s/ Joseph R. Keene
Notary Public

My commission expires Oct. 10, 1969.

Filed
Jul 2, 1966
Paul W. Horner
Circuit Clerk.

And thereafter to-wit: On the 2nd day of July, 1966, the following order was entered of record:

Miscellaneous Record, Circuit Court, Butler County, Missouri July 2nd, 1966—In Recess—(Book 14, Page 541)

Now on this 2nd day of July, 1966, comes the defendant herein, by himself and files Notice of Appeal to the Missouri Supreme Court in this cause.

[39] And thereafter to-wit: On the 8th day of July, 1966, the following order was entered of record:

Circuit Court Record, Butler County, Missouri, (Book 72, Page 162) July 8th 1966, Regular July 1966 Term

---

Now on this 8th day of July, 1966, the Court considers the defendant's Motion to Appeal as a poor person, said motion having been heretofore filed July 2, 1966, with the Circuit Clerk of Butler County, Missouri. The Court after having seen said Motion does make the order that defendant's Motion to Appeal as a Poor Person be and the same is hereby sustained.

It is further ordered by the court that the reporter prepare a transcript of the Circuit Court record and proceedings of this cause from and including defendant's Motion to Vacate Judgment and Sentence filed in this cause June 7, 1966, and all subsequent proceedings to date. Said records to be transmitted to the Clerk of the Supreme Court.

It is further ordered by the Court that the costs be taxed against the State.

[40] STATE OF MISSOURI)
) SS.
COUNTY OF BUTLER)

CERTIFICATE OF COURT REPORTER

I, Leonard W. Ehlers, C.S.R., Official Court Reporter, 36th Judicial Circuit, do hereby certify that I am the Reporter within and for the County of Butler, State of Missouri, in which the foregoing case was tried, and that I prepared the Supplemental Transcript of the Records filed in this case, as per order of the Circuit Judge dated July 8, 1966, and that the above and foregoing is a true and com-

plete copy of all of the pleadings and orders made herein since the 7th day of June, 1966.

/s/ Leonard W. Ehlers, C.S.R.
Leonard W. Ehlers, C.S.R.,
Official Court Reporter,
36th Judicial Circuit,
Poplar Bluff, Missouri.

STATE OF MISSOURI)
) SS.
COUNTY OF BUTLER)

I, Paul W. Horner, Clerk of the Circuit Court, Butler County, Missouri, do hereby certify the annexed to be the typewritten transcript of the record filed on the 21 day of Sept., 1966, in Cause No. 3158, of the causes of this Court, wherein the State of Missouri is Plaintiff and James W. Stidham is Defendant, as fully as the same remains on file and of record in my office.

[41] In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of Poplar Bluff, State of Missouri, this 21 day of Sept., 1966.

/s/ Paul W. Horner
Paul W. Horner,
Clerk of the Circuit Court

By:.....
Deputy Clerk.

APPENDIX C—Transcript in: Stidham v. State,

No. 54674

In The
SUPREME COURT OF THE STATE OF MISSOURI

JAMES WILLIAM STIDHAM,	)	
Movant,	)	
vs.	)	Case No.
STATE OF MISSOURI,	)	PCR #109
Respondent.	)	

On Appeal to the Supreme Court of Missouri from the Circuit Court of the City of St. Louis, Division No. 20.

HONORABLE MICHAEL F. GODFREY

TRANSCRIPT ON APPEAL
(Filed July 17, 1969)

Mark M. Hennelly
Attorney for Movant

Byron Kinder
Attorney for Respondent

[1] MOTION TO VACATE UNLAWFUL JUDGMENT AND SENTENCE SUPREME COURT OF MISSOURI

RULE 27.26

On the 12th day of November, 1968 defendant filed Motion as follows: (Caption, affidavit and signature omitted)

"MOTION

"1. Place of detention—Missouri State Penitentiary.

"2. Name and location of court which imposed sentence—Butler County Circuit Court at Poplar Bluff, Missouri.

"3. The case number and the offense or offenses for which sentence was imposed: Case Number 3158. Charge: First Degree Murder.

"4. The date upon which sentence was imposed and the terms of the sentence: Tried and convicted in July 1955; sentenced to life.

"5. Check whether a finding of guilty was made:

"(a) After a plea of guilty—No.

"(b) After a plea of not guilty—Yes.

"6. Did you appeal from the judgment of conviction? Yes.

"7. If you answered "yes" to (6), list

"(a) the name of the court to which you appealed:

[2] "Missouri Supreme Court.

"(b) the result in such court and the date of such result: Affirmed on September 9, 1957 (Number 45,537).

"8. State concisely *all* the grounds known to you for vacating, setting aside or correcting your conviction and sentence.

"(a) See appendix A attached hereto.

"9. State concisely and in the same order the facts which support each of the grounds set out in (8), and the names and addresses of the witnesses or other evidence upon which you intend to rely to prove such facts:

"(a) See appendix A attached hereto.

"10. Prior to this motion have you filed with respect to this conviction:

"(a) Any motion to vacate judgment under Missouri Supreme Court Rule 27.26? Yes.

"(b) Any petitions in state or federal courts for habeas corpus? Yes.

"(c) Any petitions in the United States Supreme Court for certiorari? Yes.

"(d) Any other petitions, motions or applications in this or any other court? No.

"11. If you answered "yes" to any part of (10), list with respect to each petition, motion or application

"(a) the specific nature thereof:

[3] "i. Same grounds as set out in appendix A attached hereto.

"(b) the name and location of the court in which each was filed:

"i. Butler County Circuit Court.

"ii. Butler County Circuit Court.

"iii. Missouri Supreme Court.

"(c) the disposition thereof and the date of such disposition:

"i. Denied in March 1964.

"ii. Denied June 1966.

"iii. Denied in 1966.

"(d) if known, citations of any written opinions or orders entered pursuant to each such disposition:

"i. 305 SW 2d 7.

"ii. 403 SW 2d 616.

"iii. Opinion attached hereto.

"12. Has any ground set forth in (8) been previously presented to this or any other court, *state or federal*, in any petition, motion or application which you have filed? Yes.

"13. If you answered "yes" to (12) identify

"(a) which grounds have been previously presented:

"i. All set forth in appendix A attached [4] hereto.

"(b) the proceedings in which each ground was raised:

"i. Motion under 27.26.

"ii. Motion under 27.26.

"iii. Habeas corpus.

"14. If you have filed prior proceedings in any state or federal court involving this same sentence but did not raise therein one or more of the grounds you now list in (8), state which were not raised in the earlier proceedings and why they were not raised in those proceedings:

"(a) When the first motion under 27.26 was filed with Butler County Circuit Court movant had not been supplied with the trial court transcript and therefore only raised the perjured testimony point.

"15. Were you represented by an attorney at any time during the course of

"(a) your preliminary hearing? No.

"(b) Your arraignment and plea? No.

"(c) Your trial, if any? Yes.

"(d) Your sentencing? Yes.

"(e) Your appeal, if any, from the judgment of conviction or the imposition of sentence? Appeal was taken on the transcript.

"(f) preparation, presentation or consideration [5] of any petitions, motions or applications with respect to this conviction, which you filed? No.

"16. If you answered "yes" to one or more parts of (15), list

"(a) the name and address of each attorney who represented you:

"i. Mark M. Hennelly, St. Louis, Missouri.

"ii. F. Neil Aschemeyer, St. Louis, Mo.

"(b) the proceedings at which such attorney represented you?

"i. Trial.

"ii. Sentencing.

"(c) was said attorney

"i. appointed by the court? Yes; or

"17. Are you now under sentence from any other court that you have not challenged? No.

"18. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes.

"*Appendix A*

"Answers to Question 8.

"1. The trial court erred in admitting into evidence a signed statement of the defendant for the reasons that:

"(a) the trial court's procedure for the determination [6] of the voluntariness of the confession did not comport with minimum standards of due process of law in that the trial judge failed to make a specific finding that said confession was voluntary before submitting the issue to the jury for their determination.

"(b) the overwhelming evidence was that the statement was involuntary and was the exclusive product of coercion used and practiced upon movant by members of the Missouri Highway Patrol and St. Louis City Police.

Said errors deprived the movant of due process of law as guaranteed by the 14th amendment of the Constitution of the United States and Art. I § 10 of the Constitution of the State of Missouri.

"2. Movant was denied his constitutional right to have assistance of counsel at critical stages of his proceedings as guaranteed by the 6th and 14th amendments of the Constitution of the United States and Art. I § 10 and Art. 1 § 18 (a) of the Constitution of the State of Missouri in that he was denied counsel:

"(a) the day after the penitentiary riot.

"(b) during his interrogations.

"(c) during his arraignment.

"(d) at his sentencing.

"3. Movant was denied his constitutional right to due process of law as guaranteed by the 14th amendment of

the [7] Constitution of the United States and Art. I § 10 of the Constitution of the State of Missouri for the reasons that:

"(a) the state knowingly and deliberately used perjured testimony of witnesses Trout and Creighton in that said witnesses denied any promises had been made them in exchange for their testimony, when, in fact, the state had made certain promises in exchange for their testimony.

"(b) the state knowingly and deliberately withheld and suppressed the facts relating to aforesaid promises, which evidence would have been helpful in movant's defense.

"4. Movant, because of the circumstances under which the confession was made and used, was compelled to be a witness against himself in violation of the 5th and 14th amendments of the Constitution of the United States and Art. I § 10 and Art. I § 19 of the Constitution of the State of Missouri.

"5. Movant was not advised before giving his statement that he had a right to remain silent, that anything he said could be used against him in court, and that he had a right to presence of counsel and to have an attorney appointed before questioning if he could not afford one; all in violation of the 5th, 6th and 14th amendments of the Constitution of the United States and Art. I § 10, § 18 (a) and § 19 of the Constitution of the State of Missouri.

[8] "6. Movant was denied due process of law as guaranteed by the 14th amendment of the Constitution of the United States and Art. I § 10 and § 18 (a) of the Constitution of the State of Missouri when the trial court instructed on conspiracy in instructions numbers 4 and 5 for the reasons that:

"(a) the state was allowed to prove and the jury was instructed to consider a crime that had not been included in the indictment.

"(b) the Movant was not adequately advised of the nature and cause of the accusation.

"7. Movant was denied due process of law as guaranteed by the 14th amendment of the Constitution of the United States and Art. I § 10 of the Constitution of the State of Missouri for the reasons that:

"(a) the trial court shifted the burden of proof by failing to include in instruction number 6 that unless they find 'beyond a reasonable doubt' that the confession or admission was freely and voluntarily made, they should not give any consideration to the confession or admission.

"(b) the said instruction was incomplete and inaccurate and did not comport with due process of law in that the instruction did not instruct the jury that a statement is involuntary if it is a product of 'Mental Duress' as well as physical coercion.

[9] "Answers to Question 9.

"1. (a) Petitioner was held incommunicado prior to making the confession.

"(b) Petitioner was expressly denied the assistance of counsel prior to giving the aforesaid confession.

"(c) Petitioner was protractedly, and intensely interrogated twenty-six times by relays of officers during the five-day period before a confession was obtained.

"(d) Petitioner was taken to a distant, lonely and isolated place where the confession was obtained.

"(e) Petitioner's hands were handcuffed behind his back, and numerous officers armed with sidearms and riot guns had petitioner encircled until the moment a confession was made, in the gruelling atmosphere on the hot day.

"Witnesses and evidence to support contention

"Witnesses: James William Stidham, Missouri State Penitentiary.

"S. N. Reese, Missouri State Penitentiary.

"Robert E. Burns, Missouri State Penitentiary.

"Father Al Stevens, St. Lawrence Rectory, 405 - 7th Street, Monett, Missouri.

"Mr. & Mrs. W. S. Stidham, 110 North Benwiley, Santa Maria, California.

"Foster S. Wheatley, Jefferson City, Missouri.

[10] "Thomas P. Rose, Jefferson City, Missouri.

"Evidence: Transcript of trial and newspaper articles.

"2. James William Stidham, Missouri State Penitentiary.

"3. Frank Guinan, Missouri State Penitentiary.

"4. Transcript of trial.

"5. Transcript of trial.

"6. Transcript of trial.

"7. Transcript of trial."

(Filed—November 12, 1968.)

STIPULATION FOR CHANGE OF VENUE

Thereafter, and on the 21st day of June, 1968 stipulation for change of venue was filed, as follows: (Caption and signature omitted)

"It is stipulated by and between the parties hereto that the above-entitled cause may be removed to the Circuit Court of the City of St. Louis, Missouri; This stipulation is expressly limited to the hearing of the pending cause under the provisions of Rule 27.26 and is in no way binding upon the parties hereto with respect to any other or further proceeding herein."

(Filed—June 21, 1968.)

ORDER FOR CHANGE OF VENUE

[11] Thereafter, and on the 21st day of June, 1968, the Court entered the following Order: (Caption and signature omitted)

"It appearing to the Court that the above named parties have duly made, and timely filed with the Clerk of this Court a proper Stipulation for Change of Venue; That they have paid to the Clerk of this Court a sum of ten dollars; That all of the pleadings in the case resulting in issues have been filed with the Clerk of this Court, and that the question of change of venue in the case has been otherwise duly presented to the Court, it is ordered that this case is hereby removed to the Circuit Court of the City of St. Louis, Missouri. The original file shall accompany the transcript."

TRIAL

The trial of the above-entitled cause began on the 5th day of December, 1968, before the Honorable Michael F. Godfrey, Judge, presiding in Division No. 20 of the Circuit Court of the City of St. Louis, State of Missouri. Mr.

Byron Kinder, Prosecuting Attorney, and Mr. Seneca Nolan, Assistant Circuit Attorney, appeared for and in behalf of the State. The defendant, James William Stidham, appeared in open court, in person, and in the custody of the Sheriff of this City, and in the presence of his attorney, Mr. Mark Hennelly.

[12] THE COURT: Let the record show that this proceeding is being held in open court, in the presence of the defendant, his attorney and in the presence of the assistant circuit attorney and the Court has before it for consideration the case of James W. Stidham v. the State of Missouri, PCR No. 109, further identified as C-1479-68.

Gentlemen, you may proceed.

MR. HENNELLY: Your Honor, there was a conference which I had with the Prosecuting Attorney in which we entered into certain stipulations. Did he ever write those up?

MR. KINDER: He has not. Our court reporter is in the hospital so I do not have those stipulations. They have not been transcribed or prepared, your Honor.

MR. HENNELLY: That's all right. We both recall what they were.

MR. KINDER: Yes, sure can.

MR. HENNELLY: I wanted to make a motion at this time, your Honor, and I have discussed this—I'll tell the Court frankly—with the Prosecuting Attorney and he would not acquiesce in this, quite understandably. At the time of this original trial I filed a Motion for a polygraph test for the defendant and the Court turned it down and the Supreme Court upheld that position, and at the time of the conference I again made a request and that was turned down, but now that we are in the hearing I would again ask the Court please to [13] permit the defendant to take a lie detector test, a polygraph test, touching upon any phase of his participation in the 1954 prison

riot. In the event there was any question about the costs I would be satisfied to have the costs paid for by the defendant in the event they didn't want to have it done by the Police Department of the City of St. Louis.

MR. KINDER: Your Honor, I object to it for two reasons; the first reason is that the polygraph has not been established as a scientific, reliable instrument and not admissible in Court, and, secondly, all that a polygraph exam, were it a scientific, reliable instrument, would prove would be the guilt or innocence of this defendant and that is not an issue in a 27.26 hearing. For those two reasons, your Honor, I respectfully submit that the Motion is not well taken.

MR. HENNELLY: Obviously, I do not ask for the exam for the reason that it would have any substantive value other than the fact that it touches upon the credibility of the defendant with respect to what he will testify to in Court here, your Honor, so that's the basis of it.

THE COURT: Well, let the record show that the Motion of the defendant petitioner is overruled on the basis that the Court feels—considers it to be without the scope and purview of this hearing on the 27.26; further, the probative value of the polygraph test certainly has not been [14] satisfied to this Court's intention or to the general proceedings of law it has not been established as an absolutely scientific method of determining the truth or untruth and for that reason the Motion is denied.

MR. HENNELLY: Your Honor, at the time of the conference in Jefferson City we had some discussions about the official transcript in the Supreme Court in which we wanted to introduce certain records of the official transcript into this record. Whatever came—

MR. KINDER: Mr. Hennelly, the transcript that was on file with the Court of—Circuit Court of Butler County is in the possession of the Judge in this particular cause

at this time. I turned those documents over to the Court this morning.

MR. HENNELLY: Could we then, your Honor, by leave, introduce into the record and make part of this record— On this transcript it's Page 300, which was my cross-examination of Mr. Creighton. Page 300.

THE COURT: What volume would that be?

MR. KINDER: I believe Volume I, your Honor.

MR. HENNELLY: Yes, I'm sure.

THE COURT: Three hundred?

MR. HENNELLY: Yes, your Honor.

THE COURT: All right.

MR. HENNELLY: I want the record to include—this [15] this is just a short bit of it, your Honor—from Page 300. (Reading): Q. Mr. Creighton, at any time prior to today, has there been any offer made of any kind to you by the prison authorities or by the Prosecuting Attorney, with respect to a parole of any kind? A. None whatsoever. Q. Never been any talk about that at all? A. No. Q. And you are up here testifying and you have never even discussed with them anything about anyone doing anything for you, for your testimony, is that right? A. That is right.

Then I would ask the Court, on Page 356, the same volume, with respect to the cross-examination of Mr. Trout by me. (Reading): Q. And of course you haven't been offered anything at all for your testimony, have you? A. That is right, I haven't. Q. And has there been any discussion at all about cutting down your time, or any parole or anything? A. No, sir. Q. Never was mentioned in the course of all of your discussions, is that right? A. Never has.

I would ask the Court to accept that as part of our proof, and I believe that's agreeable with the prosecutor.

MR. KINDER: Yes.

THE COURT: It will be accepted.

MR. HENNELLY: I would like to now have marked as Defendant's Exhibit 1 a statement by the Secretary of State, an officially authenticated copy, which reflects the following with respect to Mr. Trout and Mr. Creighton:

(Defendant's Exhibits 1 & 2 marked for identification.)

[16] (Reading): I, JAMES C. KIRKPATRICK, Secretary of State of the State of Missouri, hereby certify that *Herman Trout* was sentenced to 10 years in the Missouri Penitentiary on January 3, 1944. He was released under Commutation of Sentence on January 13, 1956 by Governor Phil M. Donnelly.

James Creighton was sentenced to a term of life in the Missouri Penitentiary on January 17, 1933. He was released under Commutation of Sentence on January 13, 1956 by Governor Phil M. Donnelly.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of my office. Done at the City of Jefferson, this 7th day of November 1968. And this is authenticated by James C. Kirkpatrick, Secretary of State.

MR. KINDER: No objection.

THE COURT: It will be admitted.

(Defendant's Exhibit 1 admitted into evidence.)

MR. HENNELLY: Now, your Honor, one of the sections of our Motion touches upon the charge that the defendant was convicted of a crime which was not specifically set out in the Indictment and I refer to Section 6 of the Motion.

Our position in that respect, your Honor, is that the defendant was not charged in the Indictment with conspiracy but charged with being a principal and as proof thereof—even though it's part of the official record—I would ask leave of Court to introduce Defendant's Ex-

hibit 2, which is a copy of the Indictment. You have no objection. That's [17] part of the record in this case anyway.

MR. KINDER: That's right.

MR. HENNELLY: Then, your Honor, I would ask leave of Court to introduce as Defendant's Exhibit 3—Instructions 4 and 5—which we take the position the defendant had not been previously apprised of. These are part of the official records also, your Honor.

(Defendant's Exhibit 3 marked for identification.)

Now, your Honor, with respect to Defendant's Exhibit 3, I have already directed the Court's attention to Instructions 4 and 5 and another section of our charge under this motion is that Instruction No. 6 was erroneous in that it did not include the question of mental duress, which will be part of the proof in this case, and I would ask the Court to accept in evidence also as part of Defendant's Exhibit 3 Instruction No. 6.

THE COURT: Very well.

MR. HENNELLY: Your Honor, at this point I want to put the defendant on the stand but I wonder if the Court would give me about five minutes to speak with him, please.

THE COURT: Yes.

(Discussion between defendant and his attorney.)

MR. HENNELLY: Would you be sworn?

JAMES WILLIAM STIDHAM,

being sworn, testified:

Direct Examination by Mr. Hennelly

[18] Q. What is your name, please? A. James William Stidham.

Q. You're presently an inmate of the Missouri State Penitentiary, Mr. Stidham? A. Yes, sir.

Q. And you're the movant in the Motion that is presently pending before this Court, is that right? A. Yes.

Q. Would you tell his Honor what your criminal record is, Jim? A. Well, prior to this I've been convicted of robbery and the Dyer Act.

MR. HENNELLY: Speak up otherwise it's very difficult for her to get it now.

Q. (By Mr. Hennelly) How much time did you get on robbery? A. Twenty-five years.

Q. When did you get that sentence? A. It was in—I think it was May of 1952.

Q. May what? A. May 28, 1952.

Q. When were you sentenced on the Dyer Act? A. That was in 1941.

Q. You had finished that time in a Federal institution, is that right? A. Yes, sir. That was two Dyer Act charges.

Q. Now, with respect to the twenty-five years that you got for robbery, I want to direct your attention to the night of the riot and I want to ask you, immediately prior [19] to the riot, with respect to your confinement in the penitentiary, what was the nature of your confinement at that time? A. Well, I had been in solitary confinement for quite some time before the riot. Let's see. I think I was put in there in January of 1953.

Q. In January of 1953? A. Yes, sir.

Q. And you were in solitary confinement at the time of the riot? A. Yes, I was.

Q. And had you been in continual solitary confinement from January of 1953 up until the time of the riot? A. Yes.

Q. Now, for the purposes of the record, when you say you were in solitary confinement, tell his Honor just where in the penitentiary property you were situated. A. Well, it was in two different buildings. At the beginning I was placed in what they call E-3. That was just an old isolated building, on the third floor. They place prisoners

in solitary for various offenses they might commit around the prison.

Q. Excuse me. Let me stop you there. Was that where you were at the time of the riot? A. No, sir. I stayed only on E-3 until—

Q. Wait a minute. Now with respect to E-3, how many quarters were there for solitary confinement? [20] A. There were several. I would say there was probably sixty cells.

Q. And were you visited by anyone during that time? A. No, sir.

Q. And in how big a room were you confined? A. About five by seven.

Q. And what was the furniture in that room? A. There was no furniture in there. All you had was a steel bunk suspended on a roll with a straw tick to sleep on. Didn't have any kind of bed clothes or pillow.

Q. What were the toilet facilities in there? A. It was an old dilapidated toilet and wash basin.

Q. How was the food served to you? A. Through the bars.

Q. Now, with respect to the bill of fare which they had in the general population—

MR. KINDER: Your Honor, I object to this line of questioning as being immaterial and irrelevant to this particular proceeding, how the man was fed, clothed and housed prior to the riot, prior to the crime complained of.

MR. HENNELLY: Excuse me. Your Honor, part of this proof—and I think that there is a substantial body of law to uphold this position—that where a defendant has been confined in solitary confinement, under certain circumstances, that it has a direct and in many, many instances a totally [21] vitiating impact upon anything that he says at the end of or during that solitary confinement,

and the proof in this case is going to show that a man who was in solitary confinement for two years—

THE COURT: Overruled.

MR. HENNELLY: Go ahead.

THE WITNESS: In E-3 it was a silent system up there. You weren't allowed to converse with anybody other than the guards. If you was caught talking to some other prisoners the guard would come in and whip you with clubs, and the conditions were pretty bad because there were thousands of cockroaches in the building, pigeons even come in your cell, large rats running around there. You wasn't allowed any kind of recreation, fresh air or religious services.

Q. (By Mr. Hennelly) How long were you under those conditions? A. I was under those conditions from January of 1953 until I think it was July 12th of 1954. I'll tell you, the conditions in E-3, it was so bad that the F.B.I. they made a thorough investigation.

Q. Now, when were you transferred from the "E" Hall? A. I believe it was July 12, 1954.

Q. Where did you go from there? A. I was taken to Death Row.

Q. Into Death Row. A. Yes, sir.

[22] Q. Could you tell his Honor what were the conditions on Death Row? A. Well, on Death Row you didn't even have a bunk to sleep on, all you had was a straw tick on the floor. They give you a real meager diet three times a day.

MR. KINDER: I'm sorry, I did not hear that response.

THE WITNESS: You had to eat a small diet three times a day. Didn't get much to eat.

THE COURT: "Diet" did you say?

THE WITNESS: Yes. I wasn't allowed any visitors at all while I was on Death Row. The only one that could communicate with me would be the guard.

Q. (By Mr. Hennelly) What was the size of the room that you were housed in on Death Row? A. It was approximately seven by nine.

Q. And the furniture that was in there, was it nothing other than the— A. That was all, just a straw tick on the floor.

Q. Was there any difference in the food from the "E" Hall to Death Row? A. Well, it wasn't any better.

Q. Now, from the time that you were originally put into solitary confinement in 1953 had you been out at any time for any purpose? [23] A. Yes, I had been in Cole County Circuit Court on—

Q. When was that? A. That was around—I believe it was about December of 1954. —I mean, December, 1953.

Q. And had you—Outside of that single instance in which you were over in Cole County Circuit Court, had you been continually in solitary confinement from 1953 till the time of the riot? A. Yes, sir, 1953 till the time of the riot.

Q. All right. Now, aside from the nature of the surroundings and the nature of the food that you have discussed with the Court, had you been subjected to any disciplinary action by the guards for any infraction of the rules during that period of time? A. At that time the guards more or less decided for themselves when they—you violated a rule they would whip you with clubs or—

MR. KINDER: I'm going to ask that that be stricken as not being responsive to the question, speaking generally, and the question was directed in particular to him, your Honor.

THE COURT: Sustained.

Q. (By Mr. Hennelly) Let me ask you specifically: Were you beaten at any time during those years? A. Yes, I was quite often.

[24] Q. How many times would you say? A. Well, I'd say at least seven times probably.

Q. Did this have any effect upon your health in any way? A. I'd say it had—I'd say the beatings and the confinement together, I'd say, had a great effect on my mind as well as my health.

Q. Now, you, of course, are familiar with the date of the riot, aren't you? A. Yes, sir.

Q. And at that time, as you have indicated to the Court, you were on Death Row. A. Yes, sir.

Q. Approximately what time did the riot begin? A. Around 6:00 o'clock in the afternoon.

Q. And where were you at that time? A. I was on Death Row.

Q. In the closed quarters that you have indicated? A. Yes.

Q. How long were you confined within your quarters there before you got out into the general population in the course of the riot? A. I believe the riot started around 6:00 o'clock and I got out of my cell at approximately 8:00 o'clock.

Q. Do you remember who let you out? A. No, sir. It was some colored fellow. I don't remember who it was. I think it was Ford.

[25] Q. Sir? A. I think it was Ford.

Q. Ford was the boy that was on Death Row with you? A. Yes, sir.

Q. And after you got out of your cell tell his Honor what happened. A. After I was released from my cell I went upstairs to "B" Hall, and just roamed around for probably an hour or so, and then went in the cell and listened to the radio and got something to eat and drink some coffee. I stayed there for the remainder of the night.

Q. You stayed there how long? A. For the rest of the night, till the riot ended.

Q. And when did the riot end? When was it under control by the authorities? A. Around 7:00 o'clock on September 23rd, 7:00 o'clock in the morning.

Q. Now, at that point where were you? A. I was upstairs in "B" Hall.

Q. Now, you're familiar with the late Mr. Donnell? A. Yes, sir.

Q. And I'll ask you, did you have anything to do with killing him during the riot? A. No, sir, I didn't.

Q. And after the—after you were taken into custody where did they take you then? A. I was in a cell upstairs in "B" Hall and some officers taken me out and taken me downstairs and put me in my original [26] Death Row cell.

Q. Do you recall who those officers were? A. No, sir, I don't.

Q. At that time that you were taken from "B" Hall and put in your—back on Death Row, were there any members of the St. Louis Police Department present? A. Do you mean did they escort me back down?

Q. Yes. A. Yes, sir, there was one—seems to me like it was a Major on the St. Louis Police Department.

Q. And can you tell us what happened, if anything? A. Well, when I got back to my cell, the entire floor was covered with water, probably three or four inches of water all over the floor on Death Row and my straw tick had become water logged. After the riot ended, from the time I was put back in the cell until the time I was moved from it, about five or six days later, I had to catch naps on the commode on account of the water being in the cell all the time. Immediately after I was put in the cell there was some officers stopped by there and started questioning me about the murder of Donnell. I told them that I didn't know anything about it, didn't participate in it, and he stayed for the next five or six days. There'd be groups

of officers come to my cell and they'd make different kinds of threats to me.

[27] Q. When you say "different kinds of threats", be specific for the Court. A. Well, they would call me different kind of vulgar names, even threaten to shoot me if I didn't tell them what happened with respect to that murder.

Q. Who was it that was doing that? A. Well, there was St. Louis officers and Missouri Highway patrolman. Apparently they had groups that would make regular rounds in Death Row, groups of officers, and several times each day they'd stand and harass me in my cell.

Q. From the time you were taken from "B" Hall into Death Row until the time you left Death Row, how many times were you questioned and what was the length of time you were questioned? A. I could estimate it twenty-five times. I don't think I would be underestimating.

Q. How long would each session of that questioning be? A. It would vary. Sometimes about—only last three or four minutes; sometimes maybe ten minutes.

Q. Was there any physical abuse during that period of time? A. No, sir, not during that time.

Q. Were you moved out of Death Row for that questioning or did all that questioning take place right in the same cell? A. On three different times I was removed out of [28] Death Row for questioning.

Q. The first time where did they take you to? A. First time it was about 3:00 a.m. on September 23rd I was taken to the Prisoner Classification Room.

Q. How long were you questioned there?

MR. KINDER: Your Honor, I'm having difficulty hearing this man. I heard "3:00 a.m. on the 23rd of September".

THE WITNESS: To the prison classification room.

MR. KINDER: Speak loud.

Q. (By Mr. Hennelly) Now, did they awaken you to take you there at that time? A. Yes, sir.

Q. And— A. Well, I was just sitting on the commode. I might have been dozing off but I wasn't asleep I don't think.

Q. Who questioned you under those circumstances? A. I remember a Lieutenant Barton and, offhand, I don't recall the rest of them. There were several of them.

Q. Tell his Honor what happened in the course of that interrogation. A. Well, they asked me what I knew about the murder of Donnell and what I knew about the riot. I told them I had been in solitary for nineteen months and I couldn't know anything about the riot and the position I was in I couldn't participate. They got pretty threatening and abusive. Seemed [29] like they were satisfied that they knew I did have something to do with the murder of Donnell but I guess I stayed there about an hour and a half and they sent me back to my regular cell.

Q. Did anybody threaten you under those circumstances? A. Yes, sir, they threatened—they told me I would probably get killed if I—beat to death or injured in some manner if I didn't admit my participation in the murder.

Q. When was the next time you were questioned away from your Death Row cell? A. I think that was on September 26th.

Q. Where did they take you then? A. Same place.

Q. And who did the questioning? A. I think Lt. Barton was present at that time and Mr. Nash too, I believe, and there was some others too, I don't recall.

Q. And did the questioning follow pretty much the same procedure as had been followed in the previous interrogations? A. Yes, sir.

Q. And how long did that questioning take place? A. Probably about an hour.

Q. How far would you have to go from your cell on Death Row to the Classification Room? A. Oh, about a fifth of a mile.

[30] Q. Was it— It was, of course, in a different building, wasn't it? A. Yes, sir.

Q. And during this period of time was the general penitentiary area taken over by the State Police and by the St. Louis Police Department? A. Internal guards, yes, sir.

Q. Internal guards. And they were there and visible, were they, as you would make this trip back and forth? A. Yes, sir.

Q. And when was the third time that they questioned you? A. That was in a shack on the lower yard of the main prison, what they call the field house. That was on September 27th.

Q. Who did that questioning? A. Well, there was two highway patrolmen— Sgt. Little and R. C. Caldwell— and there was—

MR. KINDER: I couldn't hear the second.

THE WITNESS: R. C. Caldwell. There were four St. Louis officers. There was— I believe their names were Rinderer, Jessie Rinderer, Elmer Overbeck, Charles Billings and Walter Eitzman.

THE COURT: Just a minute. Why don't you move that table up a little bit?

MR. KINDER: Could we, your Honor? It's awfully [31] heard to hear.

Q. (By Mr. Hennelly) How long did that interrogation take place? A. Probably an hour and a half. I don't term it an interrogation myself. I think it was accusation because as soon as I walked in they began accusing me of the murder of Walter Lee Donnell. I don't recall ever being asked if I did it by those officers there.

Q. In all three of these interrogations were there officers present with side arms? A. Yes, sir, side arms and riot guns too.

Q. Can you tell me in this third interrogation was there any threats made against you? A. Well, when I first entered the room I was placed in a chair. I had my hands cuffed behind me. They took the handcuffs off from behind me. I was placed in a chair—it was something like a G.I. belt and it was placed around my ankles. There was a heavy coat placed on me. My hands were again handcuffed behind me and after that was completed, well, Lt. Eitzman, he said he wanted to know about my participation in the riot and murder of Walter Lee Donnell. I told him I had already been questioned about twenty-five, twenty-eight times. Each time I stated I did not participate in the murder or the riot either. I'd be willing to take a lie detector test or truth serum to show them I didn't have anything to do with it, so at that time Lt. Eitzman told them to [32] give me a lie detector test. Apparently a rope had been tied on the handcuffs because I was lifted off the floor and all my weight was made to bear on my arms, and handcuffed behind me.

Q. How long were you in that position? A. Oh, I was up two different times and— I'd say the first time I was probably hung up fifteen minutes.

Q. Rather uncomfortable, I presume. A. Very uncomfortable.

Q. After that interrogation did you change your story? A. Well, they let me down after fifteen minutes and tried to talk me into giving a statement that they would dictate to me. I still declined so they hung me back up again in the same position. It was a corkball bat in the shack there. They beat me with the corkball bat over my body while I was hanging there. I lost consciousness twice while I was hanging up. I felt my left hand and arm be-

come paralyzed. It was a nervous spasm and it became numb. I assumed it was paralyzed. I decided to go along with their wishes, you know, and I wrote—

Q. You wrote a statement, did you? A. Yes, sir.

Q. You say that it was dictated to you? A. Yes, sir.

Q. Who dictated it? A. Sgt. Little of the [33] Highway Patrol and Walter Eitzman, both.

Q. Now, what did they do after they dictated the statement for you to sign? A. What did they do?

Q. Yes. A. Shortly after then they put me over in "O" Hall. That's another isolation.

Q. That was in isolation again? A. Yes.

Q. Now, at any time during the course of these interrogations and these movements did you have any lawyer with you? A. No, sir, but I made all the efforts I could to obtain a lawyer.

Q. How did you do that? A. Well, one or two days after the riot I sent my parents a registered letter. I wrote them a registered letter and I asked them to immediately come see me with a lawyer. The letter was not allowed to leave the prison.

Q. What other efforts did you make to get a lawyer? A. I tried to bribe a couple of guards to call me a lawyer. That didn't work too good.

Q. Who was your lawyer in those days? A. The lawyer I was trying to secure at that time was Richard Weber out of Carthage, Missouri. He was the one I was trying to contact.

Q. Now, after the paper was signed and you were taken [34] to "O" Hall, how long did you remain in "O" Hall? A. It covers a span of three days. I went in about 12:30 or 1:00 on the 27th and I believe that was on a Wednesday. I'm not sure what day of the week it was but three days later why I was taken over to Magistrate Court, Cole County.

Q. During those three days that you were in "O" Hall were the circumstances under which you were held there similar to the circumstances under which you had been detained for the months prior in solitary confinement? A. No, sir, they were worse. Didn't have anything at all to eat in "O" Hall. Didn't feed you anything. No water, didn't have no water. All it was was just a bare floor and as I recall the only thing I had was a pair of pants on, and as far as that goes, even after I was returned to my regular Death Row cell, after the riot had completed, I didn't have anything to eat at all till the day I went over to Jefferson City to Court.

Q. How long were you without any food of any kind? A. The riot ended on the 23rd. I went to Court, I think—I'm not sure—but I think I went to the Cole County Magistrate Court on the 29th. As we went out of prison they give us two rolls and some coffee.

Q. Give you what? A. Two rolls and some coffee.

Q. When you got to the Magistrate Court did you make [35] any further attempt to get a lawyer? A. Yes, sir, I did.

Q. What—Tell the Court the nature of that attempt. A. Well, I asked the Magistrate Judge if I could phone an attorney. At first he told me he would call him, you know. I told him—I insisted I wanted to call him. He wouldn't let me. And I knew that I was fixing to be taken to Springfield, Missouri and I felt that I needed a lawyer at this time and so I shouted out in the courtroom, I asked if a lawyer was present in the courtroom, and I shouted two or three times.

Q. Now, excuse me. This was in the Magistrate Court in Cole County on what date? A. I believe it was September 29th.

Q. Did any lawyer step forward? A. No, sir, they didn't but later on there was some lawyers told me they were present.

MR. KINDER: I object to what some lawyers told him as hearsay.

THE COURT: Sustained.

Q. (By Mr. Hennelly) Now, was this your arraignment day? A. Yes, sir.

Q. Now, tell me what was your purpose in seeking a lawyer at that time? A. Well, before the confession was obtained some [36] officers took me in front of Creighton, which was one of the State witnesses in this case, and the officer asked him to identify me as participating in the murder and Creighton told them I wasn't one of them, you know, but at that time I wanted to get a lawyer for two reasons, one was to get that statement from Creighton before somebody might entice him to change his mind and I also wanted a lawyer to examine my physical condition. At that time my body was a mass of bruises. I had lost about twenty-five pounds of weight during those interrogations and I thought that I should have a lawyer at this time.

Q. Did you think you needed a lawyer for further immediate investigation? A. Yes, sir, I did.

Q. What was the general nature and atmosphere in the penitentiary at that time? A. You mean from the official standpoint?

Q. Yes. A. Very hostile at all times. In fact, it was even hostile in the courtroom. You could even feel the hostile atmosphere there. Every time we went in court there was numerous officers in there, have riot guns and rifles and pistols. In fact, while I was demanding a lawyer at my arraignment in Magistrate Court they were trying to make me shut up and one of them nudged me with a gun before I finally shut up.

Q. Was this a time of continuing investigation and [37] interrogation by the authorities in the penitentiary? A. During the entire week, yes, sir.

Q. And it was under those circumstances that you sought out a lawyer, is that right? A. Yes, sir.

Q. Now, what judge were you arraigned in front of? A. Foster S. Wheatley.

Q. You remember the time of the day or night that was? A. Well, this was probably 9:00 or 9:30 in the morning.

Q. It was on this occasion that you shouted out in the courtroom? A. Yes, sir.

Q. And now were you arraigned by yourself or were you arraigned in a group? A. In a group.

Q. And I'll ask you, did they read the Indictment to you? A. They read the Information, yes, sir.

Q. Was it an Information at that time? A. At that time, yes, sir.

Q. And did they ask you at that time if you wanted a lawyer? Did the Court ask you if you wanted a lawyer? A. No, sir, he didn't ask me because I insisted—I was going to try to make arrangements to get a lawyer, Richard Webster, at that time and later on I found out that he did appoint some attorney but the attorney, he didn't see me the day of arraignment.

MR. KINDER: I object. The best evidence of what [38] he's testifying are the records that are in this Court's possession, as to what was done in regard to the appointment of an attorney and what transpired in the Magistrate Court, and they are in the Court's possession.

THE COURT: Well, that would be hearsay but I'm going to let it stand. Overruled.

THE WITNESS: The record does show that Judge Wheatley appointed John Obin (sic) but I didn't get to see him until, I'd say, a month later.

Q. (By Mr. Hennelly) Let me ask you this, Jim: At the time you were arraigned that first time were you represented by counsel? A. No, sir.

Q. Had you seen—Had you talked with anyone at that time? A. No, sir. For several months prior to that the only ones I talked to was prisoner officials or Highway Patrolmen or St. Louis Policemen.

Q. But from the time of the night of the riot up until the time of your original arraignment on the Information, had you talked with your parents or with any friends or with any clergymen? A. No, sir. I was under complete control and domination of the prison officials of the Missouri Highway Patrol and St. Louis Policemen from the night of the riot—well, with one exception. Immediately after I was returned to Death Row why Father Stevens—he was [39] a Catholic priest at the penitentiary—he came down to Death Row and he asked me who killed Donnell—I told him I didn't know. He just briefly walked by there.

Q. That's the only person that you saw? A. Yes, sir.

Q. Now, when was the first time you had any physical connection with a lawyer? A. First time that I had any physical connection with a lawyer was—I would have to guess. I would say that it was six weeks.

Q. Who was that lawyer? A. That was John Obin. He came to see me very briefly and I told him—well, I didn't discuss any of my case with him, I just merely told him I was going to try to make arrangements to get a lawyer and the next morning we went in the Magistrate Court for a preliminary hearing and he walked up and asked the Judge to dismiss him. The Judge dismissed him.

Q. Now, as you know, Father Clark was instrumental in my being appointed to represent you. Did you talk

to Father Clark at any time? A. Yes, sir. I was in Cole County jail after being in Springfield for probably thirty days and at my request Father Clark, he came up to see me and he asked what he could do for me. Well, I didn't know you personally at this time but told him, you know, that I would like to have you as a lawyer [40] and, from what I understood, he talked to you about it and arranged it for me. Then later on I asked the Judge to appoint you as my attorney.

Q. Now, Mr. Stidham, that original Information, I believe, was dismissed, is that right? A. Yes, sir, it was.

Q. And what was the nature of your plea at that original Information? Did you make a plea of guilty or not guilty or anything? A. Not guilty.

Q. Subsequently, as you well know, the Grand Jury of Cole County returned the Indictment. Now, were you brought over for a subsequent arraignment on the Indictment? A. Yes, sir, I was.

Q. Now, do you remember what date that was? A. No, sir, I don't recall what day it was. It seems to me like it was around Thanksgiving, 1954.

Q. At that point had you had a lawyer yet? A. No, sir.

Q. And were you arraigned in front of Judge Sam Blair? A. Yes, sir, about 9:00 o'clock at night.

Q. And at that point had you had any conversation with any lawyers yet? A. No, sir I—other than this John Obin just for a couple of minutes.

Q. And did you have any discussion with Judge Blair with respect to counsel for you at the time of that arraignment? [41] A. Yes, sir, I asked him to appoint you as my attorney.

Q. And did you make a plea to the Indictment at that time? A. I don't recall whether I made a plea or the Judge entered a plea of not guilty for me.

Q. Was that Indictment read to you then? A. Yes, sir.

MR. KINDER: Your Honor, I believe—May I interject a point? I believe the best evidence of this is the Court record and I believe the record reflects that on the 23rd of November Mr. Hennelly was present at this man's arraignment.

THE COURT: All right. Is that agreeable, Mr. Hennelly?

MR. KINDER: It's in the Court file, your Honor.

THE COURT: Well,—

MR. HENNELLY: Off the record.

(Discussion off the record.)

THE WITNESS: I'll say this, at the time Mr. Hennelly was appointed as my lawyer there was no lawyers in the courtroom, no spectators in the courtroom. It only was the Missouri Highway Patrolmen. Mr. Hennelly was appointed when I was arraigned before Judge Blair and I would say it was two weeks after that arraignment before Mr. Hennelly appeared in Cole County Court.

[42] MR. KINDER: I'd just like to keep the record in order. If there's disagreeing with the official documents as filed, the record will reflect—and the Court can see—the Indictment was filed the 23rd of November. Next entry is on the 23rd of November—Hennelly was appointed to represent Stidham and Vidauri. That maybe is the instance that he's talking about. So we can keep the Court in time sequence here.

THE WITNESS: I can tell you what date you appeared for the first time. The date you appeared the first time you filed a Motion to suppress the statement. Whatever date is on that Motion to suppress the statement that's the first date you appeared.

MR. KINDER: December 6th is the next date—entered a plea of not guilty, then withdrew the plea of not guilty and proceeded to file Motions. We're in agreement on that. Do you remember those circumstances?

MR. HENNELLY: No, I don't but the record will show.

THE COURT: All right. Let's proceed.

Q. (By Mr. Hennelly) Now, after we had the trial in Poplar Bluff and you were sentenced in Poplar Bluff by the late Judge Randy Weber, my office associate, Mr. Aschemeyer, was present with you, is that right? A. Yes, sir.

Q. And I was not here but he was there, is that right? A. That's right.

MR. HENNELLY: I have no further questions.

[43] *Cross-Examination by Mr. Kinder*

Q. Mr. Stidham, at the point of time when you were sentenced by the Court in Butler County, sir, had you talked to Mr. Aschemeyer prior to the time that you went into Court with him? A. No, sir.

Q. Didn't the Court at that time, and it was on—I don't know what date the sentence took place—it's a matter of record—but didn't the Court interrogate you as to Mr. Aschemeyer's representation in your behalf? A. I believe that the Judge—I believe Mr. Aschemeyer advised the Judge that he was down here on Mr. Hennelly's request to represent me. I think the Judge asked me if I had any objection to it. I couldn't object to it.

Q. Didn't you tell the Court you had no objection to Mr. Aschemeyer's representation? A. I would say that I probably did.

Q. Well, did you or didn't you? A. I didn't have any alternative.

Q. Answer me, did you or did you not object, sir? A. To my knowledge I didn't object.

Q. That's right, sir

You testified that you were placed in solitary confinement. What have you—In January—Was it the 18th of January, '53 that you were put in? A. I can't recall the date, Mr. Kinder. It was somewhere [44] around there, I believe.

Q. All right, sir. And you were placed in there for a period of one year, were you not, for attempting to escape from the penitentiary? A. I believe that was the sentence to begin with.

Q. All right, sir. A. I wasn't released but—I wasn't released at the end of the year.

Q. All right. Could you tell the Court why you weren't released at the end of the year? A. I don't know.

Q. Well, isn't it a fact that at the end of the year you were kept in "E" Hall but you were transferred to a less secure place within "E" Hall into a facility that had more pleasant surroundings than the one which you had spent your year? A. No, sir. At the end of the year I remained in the same cell during the entire—

Q. Weren't you moved from the third floor to the second floor? A. No, sir, I never was on the second floor of "E" Hall.

Q. How many years had you spent in penal institutions prior to your incarceration in the Missouri State Penitentiary? A. I think about ten years.

Q. All right, sir. Did you receive regular visitors during those periods of time? A. Yes, sir.

Q. All right. Before you were placed in administration [45] segregation when was the most recent time a visitor had come to see you? A. I don't recall.

Q. You didn't receive frequent, regular visitors in the Missouri State Penitentiary, did you, prior to the riot? A.

Yes, sir, I receive frequent visitors in the Missouri State Penitentiary now.

Q. I'm talking about prior to the riot. A. Yes, sir.

Q. On what sort of basis? A. Oh, probably three or four times a month.

Q. All right, sir. What sentence are you presently serving at this time? A. I'm serving a life sentence.

Q. Have you done that twenty-five years? A. Yes, sir, I've been locked up for about seventeen years.

Q. Was that sentence commuted, the twenty-five year sentence? A. No, I served it.

Q. All right, sir.

MR. HENNELLY: I guess the last time amounted to the seventeen years, did it?

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THE WITNESS: Yes, sir.

Q. (By Mr. Kinder) When did you commence serving the last sentence? A. February 2nd of this year.

[46] Q. Of this year? A. Yes, sir.

Q. Do you recall who the trooper was, sir, or troopers were that took you from your cell in "O" Hall to your—I mean in Death Row, as you refer to it, to your first interrogation; do you remember who those gentlemen were? A. From Death Row to my first interrogation?

Q. Yes, sir. A. No, sir, I don't.

Q. Were they the same gentlemen who interrogated you? A. You mean did they remain at the interrogation?

Q. Yes, sir. A. They remained present, yes, sir.

Q. And, as I understand your testimony, the first few interrogations outside of your cell which you make reference to were conducted by Lt. Barton of the Missouri Highway Patrol, is that right? A. Yes, sir, he was present.

Q. Was he the one interrogating you? A. Yes, sir.

Q. And I understand your testimony to be, the man that dictated the confession which you wrote out by hand was Percy Little, is that right? A. Yes, sir, and Lt. Eitzman.

MR. KINDER: I don't believe I have any further questions.

MR. HENNELLY: Your Honor, we filed a Motion—[47] a subpoena duces tecum for certain police records in this case and I wonder if they were ever delivered into the Court or any return made on that.

THE COURT: You may step down.

(WITNESS EXCUSED.)

(Discussion off the record.)

MR. NOLAN: Was that on the record?

MR. HENNELLY: No, but I'm going to put it on the record.

CHARLES BILLINGS,

being sworn, testified:

Direct Examination by Mr. Hennelly

MR. HENNELLY: I think, your Honor, that for the purposes of this record that we are putting this officer on as an adverse witness. He's an officer that testified on behalf of the State in the original case and I'm putting him on for the limited purpose of asking him a question about the subpoena duces tecum.

THE COURT: All right. Proceed.

Q. (By Mr. Hennelly) What is your name, please? A. Detective Charles Billings.

Q. Sgt. Billings, did you have reason to make a search of the records of the St. Louis Metropolitan Police Department for any and all records which applied to the participation of the Police Department in the 1954 prison riot? A. Yes, sir, I did.

[48] Q. And have you brought any records with you? A. No, sir, there were none available.

Q. There are none available? A. No, sir.

Q. Can you tell his Honor how many of you officers were up there at that time? A. There were a hundred and two police officers from St. Louis.

Q. How long were you up there? A. The greater majority returned after about three days and twenty-five of us remained for about approximately another week.

Q. There is not in existence any record of any kind in the St. Louis Metropolitan Police Department? A. No, sir, not at this time. It was only made up for the report. It wasn't an official report. There was never a complaint number made on it and it was just to take care of the expenditures and time involved.

MR. HENNELLY: I have no further questions.

MR. KINDER: I have no questions.

Cross-Examination by Mr. Nolan

Q. Officer Billings, when you conducted this search of the records was that this week? A. Last week and this week.

Q. Was that search conducted because of a subpoena directed to you or any of your superiors, that you were aware [49] of? A. No, sir, it was by your request.

Q. It was my request. A. (Nods head.)

MR. NOLAN: That is all.

MR. HENNELLY: I have no further questions.

(WITNESS EXCUSED.)

THE COURT: Court is in recess.

(Thereafter, Court stood in short, temporary recess after which time Court convened again and the following proceedings were had in open Court, in the presence of the defendant, and respective counsel.)

MR. HENNELLY: Your Honor, the defendant has asked that the witnesses for the State be segregated.

THE COURT: All right. Sustained.

MR. HENNELLY: Your Honor, we had anticipated putting on Mr. Aschemeyer in this case but he told us originally that he was in a trial in Washington, D.C. and that he may not be back in time, and I would—We're finished with our evidence as we have it now and in the event that he would come in any time during the day we'd ask leave to put him on, but we're finished with our affirmative evidence.

THE COURT: All right.

MR. KINDER: I'd like to call William Barton.

STATE'S EVIDENCE

[50] WILLIAM S. BARTON

being sworn, testified:

Direct Examination by Mr. Kinder

Q. Would you state your name, sir? A. W. S. Barton.

Q. What is your occupation, Officer? A. Highway patrolman.

Q. What was your occupation in the year 1953, sir? A. I was also a highway patrolman at that time.

Q. Do you know the petitioner in this cause, Mr. James Stidham? A. I know him, yes.

Q. Did you have occasion to see him in the month of September, 1954, sir? A. I seen him.

Q. Did you ever during the month of 1954 interrogate this man? A. Never.

Q. Were you ever present in any room at any time when he was interrogated? A. Never did; never was.

Q. Would you briefly, sir, tell the Court what your function was in the course of the quelling of the Missouri Prison Riot in 1954, sir? A. Well, I was assigned to the night crew of investigating of the riot, arson, everything else in connection with the riot, and they was a group of officers also with me but I was in charge of that particular group.

Q. Now, did you interrogate some of the men who were ultimately charged with the murder of one Walter Donnell? [51] A. Oh, yes, sir.

Q. But you didn't interrogate this man, did you, sir? A. No, sir, I did not.

Q. This may be redundant but did you interrogate him on the 23rd of September, '54? A. No, sir, I never did interrogate him.

Q. How about—Then I assume your testimony would be the—nor did you interrogate him on the 26th of September. A. No, sir.

Q. Do you recall whether you saw him either of those two days? A. I don't recall but I probably did see him but as far as talking to him, interrogating him, I never did and never have.

MR. KINDER: I don't believe I have any further questions.

Cross-Examination by Mr. Hennelly

Q. Lieutenant, you testified in the murder case down in Poplar Bluff, didn't you? A. Yes, sir.

Q. Have you had reason and opportunity to examine your testimony recently about that? A. No, sir, I have not. I haven't seen it.

Q. Sir? A. No, sir.

Q. What is your present position with the State Highway Patrol? A. Captain, Troop "C", Kirkwood.

[52] Q. When were you made Captain? A. September, 1962.

Q. And at the time of the riot what was your— A. Lieutenant.

Q. Did you have anything to do with the original attempt to contact Creighton and did you interrogate Creighton? A. Yes, sir, I was the first officer to find him.

Q. Did you talk to Trout? A. Trout? Yes, sir; yes, I talked to Trout.

Q. How long did you talk to them, to both of them? A. Well, I don't know. I talked to them on several occasions.

Q. Well, would you say really that you were in charge of the State Highway Patrol investigation that night, the night of the riot? A. I wasn't appointed in charge of the night duty until the following night.

Q. Well, the following night then would you say that you were in charge of the investigation? A. Part of it.

Q. Now, tell me which of those defendants did you question? A. What defendants I questioned?

Q. Yes, sir. A. Laster, Noble, Hoover, Stidham—not Stidham, pardon me—DeLapp and Vidauri.

[53] Q. Then your testimony is really that you questioned all of the defendants except Jim Stidham. A. It's what?

Q. You had a part in the interrogation of all of the defendants that were charged in the murder but Jim Stidham. A. Oh, no, no. Kenton was also charged with him.

Q. You didn't question Kenton? A. No, sir.

Q. I presume that you were called down in the 27.26 motion for Kenton, were you? A. No.

Q. Turn to page 116.

Is it your testimony that you didn't have anything to do with the questioning of Kenton? A. I said Kenton. I didn't say I didn't question him.

Q. Well then you questioned— A. I did question him.

Q. Well, I thought that you said a minute ago that beside Stidham that the one of them you didn't question was Kenton. A. Well, I don't— that's—I'd like to have that read back, Judge.

MR. HENNELLY: Well, I'll clear it up.

THE COURT: Well,—

Q. (By Mr. Hennelly) Did you question every defendant [54] in this case but Jim Stidham? A. No, sir.

Q. Which ones didn't you question? A. I didn't question him.

Q. Stidham. Which other ones of the defendants? A. I don't recall. At some time or other I probably talked to all of them.

Q. Except Stidham. A. Yes.

Q. Turn to page 116. I'm sure you recall our trial down in Poplar Bluff. A. Oh, yes.

Q. I'm going to ask you—and I'm referring now to Page 116 of Volume I of the transcript—(Reading): Q. And when was the first time, after you had arrived there on the night in question, that you saw the Defendant, James Stidham? A. I saw him, oh, it was during the night, I don't know what time it was. Q. And where did you see him? A. He was standing out just off of the lobby on the same floor level, on the B side of the cell blocks. Q. And would the position you saw him be indicated on State's Exhibit 1 there? A. I can't do it there. Q. You mean— A. That isn't what I am talking about. That isn't the floor level I am referring to. Q. Tell us with respect to that State's Exhibit 1, where was he, was he upstairs or outside? A. He was upstairs above this. Q.

All right. Did you question him or talk to him at that time? A. I had no reason to. Q. Did you question or talk to him at anytime after the night of the 22nd? A. I talked [55] to him on the night of the 23rd. Q. Now, where was that questioning, where did that questioning take place? A. In the Classification Room, just off of the large tunnel across from the Deputy Warden's office. Q. You know what time of the day or night that was? A. Well, I judge it to be around about—between eight and nine, somewhere in that neighborhood, sometime after we had gone to work. Q. Now, the Classification Room Lieutenant, is there furniture in there? A. Yes, there is seven or eight chairs and a table.

Now, these were the questions that I asked you on cross-examination and I want to ask you whether or not you recall now testifying in this case some thirteen or fourteen years ago the fact that you did, as a matter of fact, question Jim Stidham in the Classification Room A. Well,—

Q. You do— A. The record speaks for itself. I don't recall talking to him. We talked to an awful lot of them the next few nights and possibly I did talk to him but didn't take any statement from him.

Q. Wouldn't you say, Captain, that your memory would have been better immediately after the incident and at the time of the crime than it is today? A. Probably was.

Q. Now then, I want you to try and refresh your memory and I want to ask you after you think about it if you don't [56] recall questioning him? A. Do I recall questioning him do you say?

Q. Yes. A. Actually I don't recall. Like numerous others, because as I explained a while ago we talked to hundreds of them, I guess, that particular night—not that particular night, of course.

Q. I want to refer to Page 118 of Volume 1, and this was again the recross-examination. (Reading): Q. Now Lieutenant, I am going to show you what has been accepted in evidence as State's Exhibit 11. At the time you questioned the Defendant Stidham, was it in that room that is reflected on State's Exhibit 11? A. That is right. Q. And at the time he was brought in, was he seated at that table? A. Yes. Q. And at that time was he handcuffed, if you know? A. No, sir. Q. And how many men were there questioning him at that time? A. Well, I don't recall, five or six of us. Q. And was he sent back to his cell then? A. That is right.

Now, I want you to think back a little bit, Captain, and see if you recall the circumstances under which he was questioned that night. A. Well, I'll have to say that—like I stated a while ago, that we talked to so many that first time immediately following the riot—which would have been the next night, actually—and I don't recall now any more than I did a while ago.

[57] Q. But you recall questioning all of the others except Stidham? A. Well, I won't say that we questioned him that night.

MR. HENNELLY: I have no further questions.

MR. KINDER: I have no further questions.

THE COURT: You may step down.

(WITNESS EXCUSED.)

MR. KINDER: May this witness be excused, your Honor?

THE COURT: Mr. Hennelly?

MR. HENNELLY: Yes, I have no further questions.

MR. KINDER: Thank you, Mr. Barton.

Mr. Percy Little, please.

P. R. LITTLE,

being sworn, testified:

Direct Examination by Mr. Kinder

Q. Would you state your name, sir? A. Percy R. Little.

Q. And what is your occupation, Mr. Little? A. At present I'm a field representative of the State Board of Healing Arts.

Q. Mr. Little, what was your occupation on the 22nd of September, 1954? A. I was a Missouri State Highway Patrolman.

Q. How long were you on patrol after September 22, 1954? A. Until 1956.

[58] Q. Were you involved in the quelling of the riot which took place in the Missouri State Penitentiary on the 22nd of September, '54? A. Yes, sir.

Q. Would you tell the Court what your function during the days following September 22nd was, sir? A. Well, following the riot there were some Highway Patrol officers and some St. Louis police officers that were assigned to attempt to find out who was responsible for the murders and the arson that had occurred there.

Q. And what was your capacity in that investigation, sir? A. I was one of those officers that were so assigned.

Q. Were you in charge of a detail? A. No.

Q. Who was in charge of the detail you were assigned to, sir? A. I don't recall. See, it was a night and day operation there and I'm not sure—I'm not sure who may have been in charge of the day force. Sergeant Nash was also there at the time.

Q. Do you know the defendant, James Stidham? A. I remember the name and remember of his involvement there, yes.

Q. Did you have occasion during the course of the investigation of the murder of one Walter Lee Donnell to either [59] interrogate Mr. Stidham or to be present while he was interrogated? A. There were many interrogations at that time. I do faintly remember being present during the interrogation of this subject.

Q. Do you remember how many times you were present when he was interrogated? A. No, really I don't remember one time.

Q. All right, sir. If I may, with leave of Court and with Mr. Hennelly's acquiescence, I don't want to separate this exhibit. I just want to use one part. May I mark it all as one exhibit?

MR. HENNELLY: Which is this, the statement?

MR. KINDER: The statement and other documents attached to it as they were used in Court, and I don't want to separate them. I just want to offer this one particular part of the statement, your Honor.

THE COURT: All right, mark it.

(State's Exhibit A marked for identification.)

Q. (By Mr. Kinder) Mr. Little, I will show you that which has been marked State's Exhibit A, which is composed of four photostatic pages. I want to call your attention only to the last page of that document, of those documents, sir, and I'll ask you if you will, for the record, identify that document. [60] A. Well, this appears to be a photostatic copy of a statement that was made by this defendant in Jefferson City.

Q. By the defendant you mean James Stidham, sir? A. Yes.

Q. Were you present when that statement was taken? A. Yes.

Q. Is your signature anywhere on that document, sir? A. Yes, it is.

Q. And did you witness his statement? A. I witnessed the signature, yes.

Q. Now, do you remember when that took place, sir? A. No, I really don't. It was during the daylight hours, I can remember that. I note that the date is entered on this statement but that would be the only way I would recall it.

Q. All right, sir. Assuming that that date on the statement is correct, September 27th, were you present during the total time that Mr. Stidham was interrogated prior to the statement having been taken? A. By "total time" you mean from the time that—

Q. From the time he was brought to the place where the statement was written till it was written. A. I don't believe I was present the total time.

Q. All right, sir. A. Now I'm not sure about that. I don't know because, as I say, this was one [61] of several and I'm not sure but as I recall it—and I'm stating this not from direct memory of exactly what happened but because of the fact of the procedure that was being followed—I think that I would say it would be more specific to say that I was in and out during the time of that. I don't think that I stayed there during the entire time.

Q. Do you remember how long the interrogation took place, sir? A. No, I don't.

Q. Mr. Little, during the time that you were present at the execution of this instrument, was Mr. Stidham at any time physically abused in your presence? A. No.

Q. Did he ever complain to you of having been physically abused? A. No.

Q. Do you recall what his physical appearance was at the time this statement was written? A. Seemed normal to me. I don't think I'd seen him very many times before, if I remember. I don't know whether I had seen him at all but I'm sure at this time there was nothing

about his appearance that would indicate any difference than any other time.

Q. Did he complain of being hungry, tired or thirsty? A. No.

Q. Did he complain to you or any of the officers in your presence and in his presence that he wasn't being fed [62] or that he hadn't had water? A. No.

Q. Did he appear, if you remember, sir, to be suffering from malnutrition or from hunger? A. No, I don't recall any such appearance as that.

Q. Now, this statement is handwritten. Do you know in whose hand it is, sir? A. Well, as I recall it, Stidham wrote this thing himself; however, I'm not sure that I could swear to that but that's my remembrance on it. He wrote it.

Q. Did you dictate this statement to him? A. Well, no.— You mean by "dictating", tell him what to write?

Q. Yes, sir. A. Oh, no; no.

Q. Did you threaten him? A. No.

Q. Did you threaten to kill him? A. No.

Q. Did anyone in your presence threaten to kill him? A. No, not in my presence.

Q. Do you know whether anyone threatened to kill him, that is, of the police—

MR. HENNELLY: Well, I'll object. That's a conclusion.

THE WITNESS: Not in my presence.

MR. HENNELLY: That's sufficient. That's all right. Not in his presence.

[63] Q. (By Mr. Kinder) When you first saw him do you recall whether or not he was handcuffed? A. Well, I can't remember whether he was already in the room when I got there or whether I— I would assume he was handcuffed if he was brought down through the yard but I don't recall him being handcuffed in the room.

Q. Do you recall whether or not you or any of the other officers in the room at the time of the interrogation and at the time that this statement was written were armed, sir? Did you have a weapon on your person visible? A. I believe so, yes.

Q. Would you tell the Court what, if you recall, sir, what the conditions were inside the penitentiary on the 27th of September, on the day of this confession? A. Well, with reference to the physical condition of the prison, there had been a lot of fire and there was a lot of destroyed building and it was— I think that the whole condition would be somewhat unsettled. I think that it would have been, at least not later that the riot, would have been considerable question as to whether or not the prison was entirely secure at that time.

Q. Was that the reason why you and the other officers were armed, sir? A. Oh, yes, we were all armed. As I recall, all the uniformed personnel in there were armed, yes, sir.

[64] Q. This was a time of chaos, was it not, sir, inside the penitentiary? A. It was settling down at that time but I think at that time we did not consider the prison completely secure, as I remember it.

Q. Did you ever talk to Mr. Creighton or Mr. Trout? A. Yes.

Q. Did you talk to them before or after you talked to the defendant or the petitioner, Mr. Stidham? A. Before.

Q. Did you indicate to Mr. Stidham what had been told to you by Mr. Creighton and Mr. Trout?

MR. HENNELLY: I'll object to that, if your Honor please; hearsay and a conclusion on the part of the witness.

THE COURT: No,— Read the question back.

(Question read by the reporter.)

THE COURT: Overruled.

MR. HENNELLY: Excuse me, your Honor. I think he's trying to do here by indirection that which he cannot do by direction, and I refer the Court to the case of State of Missouri versus Chernick in which an attempt was made to use this type of question and then let either the Court or the jury take what is only conclusion from it—and that is that whatever was told him by Trout and Creighton amounted to a certain type of testimony. Now, they couldn't put that [65] testimony in in direct examination—Trout and Creighton isn't here—but this is an attempt to put it in indirectly, and I'll cite the case of Chernick which specifically held that to be inadmissible and reversed on Judge Mayfield.

MR. KINDER: Well, your Honor, I'm not trying to elicit what was told him. The question was intended to garner from this witness whether or not he had told this man that he had had conversations with Creighton and Trout.

MR. HENNELLY: I understand what he's trying to do.

THE COURT: What is the citation on that case?

MR. HENNELLY: I don't know the citation, your Honor. It was tried about 1956, tried twice, reversed twice—State of Missouri versus Chernick—and I'll tell you what the facts were.

They tried to do exactly the same thing by suggesting that the reason Chernick made certain statements was because of what somebody else said and they couldn't put it in the case in chief so they let the jury conclude what was told them and that was held to be reversible error.

THE COURT: Well, I'll sustain the objection on the representation to this Court that this case holds what you say it does.

MR. HENNELLY: That's right, your Honor, I make that representation.

THE COURT: You understand the objection? They're [66] not trying to elicit what was said.

MR. HENNELLY: I understand that. But indirectly they elicit what was said because obviously the purpose of that question is to let the Court think that Trout and the other man told him something and that they when they turn around to the defendant and they say to the defendant, Trout and the other one told me something, that then he reacts in a certain way, and that reaction of his is in effect putting into evidence by indirection what they can't put in by direction.

THE COURT: On your representation that the case holds what you say it holds—

MR. HENNELLY: I'll stand by that, Judge.

THE COURT: All right. Proceed.

MR. KINDER: What was the Court's ruling?

THE COURT: Sustained.

MR. KINDER: All right, sir.

May I ask the Court's indulgence just a moment? I want to read over this old transcript.

Q. (By Mr. Kinder) May I ask you this, Mr. Little? Did anyone promise Mr. Stidham anything in return for his having written out this statement? A. Not as far as I know. I didn't.

Q. Did anybody in your presence? A. No.

Q. Did you see anybody strike the defendant on the legs [67] and body with a corkball bat? A. No.

Q. Did you see anybody tie a rope upon any handcuffs to a beam or something in the room? A. No.

Q. Did you see any time that you were in that room any such device capable of hanging this man in the position in which he described here in Court this morning, that is, by these handcuffs from some member in the building? A. No, I don't know what they're talking about.

MR. KINDER: I have no further questions.

Cross-Examination by Mr. Hennelly

Q. Mr. Little, how long had you been with the State Highway Patrol at the time of this riot? A. I went on patrol in '32. I was gone for six years and except for that time I'd been on the patrol throughout that time.

Q. So you were on the patrol from '38 to '56, weren't you? A. No, from '32.

Q. Yes, but didn't you go back on in '38? A. No, I went on the patrol in '32. I was in service from the end of the 1940's until Spring of '47 and the remainder of the time I was on the patrol.

Q. Now, tell me again the date that you took this job with the Healing Arts group with the State of Missouri. A. It was in 1964.

Q. '64? A. Beginning of '64.

[68] Q. 1964? A. Uh-huh.

Q. And at the time of this interrogation what was your rank? A. Sergeant.

Q. And did— When you left were you a sergeant then too? A. Uh-huh.

Q. What time did you first arrive at the penitentiary the night of the riot? A. I think it was about 9:30 or 10:00 o'clock.

Q. Were you there with the original contingent that came in? A. No.

Q. Who was in charge of the entire group for the State Highway Patrol? A. Well, I suppose the superintendent would have been.

Q. Who was that at that time? A. Colonel—

Q. Wagner? A. Wagner.

Q. Was he on the scene? A. He was there, in and out, yes.

Q. Now, had you been—Did anyone give you some specific duties at the penitentiary? Were you on a team

of interrogators or anything like that? A. Well, I don't know that any team of interrogators was actually set up. By remaining there during that period of time we would, I would say, automatically become part of an interrogation.

[69] Q. So that you— You took part, I presume, in a number of interrogations, did you? A. Yes.

Q. Now, besides the defendant, Jim Stidham, were you present at the interrogation of Vidauri, the little Mexican boy? A. I don't know.

Q. What about Noble? A. Those names are—I can't distinguish those people one from the other. They were—there were a lot of people interrogated but I just can't distinguish one name from another because I've had very little contact with them since and I just don't remember them.

Q. Let me try it a different way. Did you testify in each of the trials? A. I don't think so.

Q. Do you know which trials you didn't testify in? A. No.

Q. You testified in a number of them, though, didn't you? A. I testified in some of them.

Q. Now, I want to ask you: The exhibit which Mr. Kinder has introduced as State's Exhibit A, you recall generally what room that statement was taken in? A. I believe—I can't say that I remember specifically where that statement was taken but from what I've heard around here I would assume it's at the Athletic Building.

[70] Q. You don't recall of your own knowledge though where it was. A. I can't separate one from another, that's the trouble, in that period of time. It's quite possible that Stidham was interrogated but I couldn't swear for sure that he was. It was in a room, I know, but I'm not sure where.

Q. Had you been present at any prior interrogations of Stidham prior to the time the statement was taken? A.

I do not recall having talked to Stidham prior to this entry. I may have but I don't recall it.

Q. Do you recall whether or not up until the time that this statement was taken that Stidham had been denying that he was in—had anything at all to do with the murder? A. Well, I have testified that I do not recall having talked to him prior to this time. Now at that time, at the time of the beginning of this conversation in this statement, it would be my recollection that he at that time said that he was not guilty.

Q. Said he was not guilty. A. (Nods head.)

Q. Now, I want to get the general setting in that room. How many of you were there other than the defendant? A. I don't know.

Q. Well, there are some statements on—signatures on here. A. The signatures of the people on that statement were, [71] I'm sure, put on at that time, therefore, they were in the room at that time. As to whether or not they had been in there—how much they had been in there I certainly am not in a position to recall.

Q. Now, listed on here as witnesses, Lt. Walter Eitzman—at least at that time Lieutenant—Patrolman Overbeck, Patrolman Charlie Billings, Jenneman and R. C. Caldwell. Now at least four of these police are St. Louis Police Department personnel. Did they have pistols with them in that room? A. I don't recall whether they did or not. If they were in uniform I assume they did have but I can't remember those details.

Q. What about riot guns? A. Well, I believe that it was customary procedure for the members of the Highway Patrol to have riot guns. I would assume that I had one because we were carrying them at that time and all the time we were out in the yard.

Q. As a matter of fact, even in answer to Mr. Kinder's statement it was a period of chaos and you were there to maintain order, weren't you? A. That's right.

Q. And don't you recall now that everyone was armed? A. No, I certainly don't recall that everyone was armed. I don't recall who all may have been in there but I do believe—it's my belief that everybody who was in uniform [72] had some sort of weapon, sidearms or, in case of the Highway Patrol, shotguns.

Q. Now, with respect to the time the statement was taken, were you of a group that went to the cell and got Stidham or was he brought to you in the room; do you recall? A. I don't think that he was brought to me and I don't recall having gone to his cell to get him. I don't recall how he happened to be in the room or how I happened to be there. I mean as to who was first or what, I don't remember.

Q. Well, do you know how long he was in the room denying the fact that he had anything to do with the murder before this statement was made? A. No, I don't.

Q. Was he handcuffed when you first saw him? A. That is what I don't remember. If I saw him when he was brought from the cell down there I again would assume that he was handcuffed. If he was already in the room and not in the process of being moved from one place to another I would assume he was not handcuffed.

Q. Who was the main interrogator in the case? A. Well, that would be difficult to say, as to who was the main interrogator. I don't know.

Q. Was there a table in that room? A. I believe there was.

Q. Were there chairs around the table? A. Yes, I believe so.

[73] Q. Was Stidham standing or sitting at the time of the interrogation? A. Well, I don't remember. There wouldn't have been any point in him standing. I think he would have been sitting. I don't remember.

Q. Were the officers standing or sitting? A. I think the officers were sitting mostly and they would— I don't think that anyone stayed in the room all the time. I think that it would be common practice for people to get up and move and go out and get a drink and come back or whatever.

Q. Do you know how long the defendant was in that room at the time this statement was taken? A. No, I don't.

Q. Was it an hour, two hours, three hours; do you have any idea at all? A. I noticed in the part of the statement that I saw a minute ago that it was given at 2:00 p.m. or something, thereabouts, and I would— I don't know. I can't answer that. I just don't remember but I wouldn't say that he had been in there for any very great length of time, certainly not before the noon hour.

Q. Would it be a fair statement to say that you really don't remember anything about this matter except for the fact that nobody did anything wrong in terms of harming the defendant; that you recall clearly, don't you? [74] A. No, I would not say that is the only thing I remember about the statement. I testified that I remember being present at the time the statement was made. I remember participating in the interrogation and I certainly would not limit my recollection of that negative thing.

Q. Who had the paper, for instance? The defendant didn't come in with a paper and pen, did he? A. No, I'm sure he didn't.

Q. Who had this with them? You don't know that, do you? A. I don't remember. It wasn't me because I'm sure I wasn't carrying a briefcase or I would not have had paper.

Q. Was everything that was written in this statement written straight out by the defendant? A. It was written by him, yes.

Q. And was there anyone counseling him or even talking to him while this statement was being made up? A. Yes.

Q. And isn't it a fact of the matter that the counseling and talking they were doing was telling him what to put in the statement. A. That is a little bit difficult for me to explain. I would not say that Stidham was not directed as to the format of that thing. For instance, the opening paragraph, the identifying paragraph, that is typical of a statement that I [75] may have taken in my experience.

Q. Can we agree then at least that part was dictated? A. I assume that I probably directed him as to how to make that opening paragraph but not as to the facts in the opening paragraph but as to just the format of it, how to put it down.

Q. Well, what about the sequence? A. The sequence?

Q. The sequence of events as they are recalled in the statement. Did you make any suggestions to him as to how that might be? A. Probably some.

Q. Did— A. Not as to what the facts of the matter were but as to the format in which to put it in there, but not specific wording for the thing. He may have been directed. I say he may have been because again I'm saying that I don't remember exactly what took place right in that statement but he may have been directed as to the format of the thing but not as to the facts in it.

Q. You don't even recall whether you were there for the whole thing, do you? A. The taking of the statement?

Q. Yes. A. I was there during the time that the statement was written, yes.

Q. You remember that. That is one thing we can be [76] certain that you remember. A. I'm sure that I was there throughout the time.

Q. For the entire writing of that statement, is that right? A. Yes.

Q. Now, was there anyone else that made any suggestions to the defendant as to the format or the style upon which he should write this? A. Well, I don't believe. If I testified that I was the only one that may have made suggestions I don't think that I intended to testify to that but I'm sure that I did participate in that. As to being the only one that made any suggestions, I wouldn't say that.

Q. Now, this particular building that we're referring to, were there armed guards on the wall around the building, outside the building? A. Well, this building—if it's the one that I'm thinking of—is not very close to a wall and I don't believe that that building would be considered to be right immediately adjacent to any guards, no. The main wall, it seems to me, is some little distance away from this building. This building is out in the middle of the athletic area, as I recall it, if that's the building I'm thinking about.

Q. You think you might even be wrong about the building? A. I remember that there was some interrogations made in the building that was a part of the athletic setup of this [77] prison, and that was out in the yard, and I assume that is the building that is under consideration here but again I am not absolutely positive that that was the building in which Stidham was interrogated from my own recollection. There were interrogations made in a number of different places.

Q. Turn to Page 503.

Do you know who was taking notes in that room? A. From what— Any particular agency you have in mind? I think that probably if Sgt. Nash was in there—and I believe he was—he would probably have been the one that would have been making notes for the Highway Patrol Department.

Q. Do you recall now whether or not the defendant had been manacled during the questioning up until the time that he started to write this statement? A. No, I don't remember.

Q. You don't remember that.

Turn to Page 504. I want to ask you if I asked you this question down in Poplar Bluff. (Reading): Q. And was he, during this first interrogation when the oral statement was given, was he handcuffed then? A. I think he was handcuffed until the time that he started the writing.

Do you recall my asking you that question and you giving that answer? A. I— No, I do not.

Q. Was this— Is it your testimony that this was the [78] only written statement that the defendant gave, that he didn't write out something and scratch it out and finally put it down in this form that you wanted or was this the only one that was done? A. I don't remember.

Q. You think it's possible that there may have been some other statement written out at that time? A. By Stidham?

Q. Yes, by Stidham. A. No, I don't remember. I don't recall.

Q. You indicated something a minute ago about 2:30. Where did you pick that time up, 2:30? A. Isn't that on there somewhere, either at the heading or the—

MR. KINDER: 12:30.

THE WITNESS: Was it 12:30?

Q. (By Mr. Hennelly) You just looked at it wrong there, Mr. Little. A. I guess I didn't see the "one" in front of it. I thought it was 2:30.

Q. But you don't recall how long he was in the room before he finally finished signing it? A. No.

Q. Could it have been three hours? A. Well, I'm sure I wasn't around there three hours, not at that time.

[79] Q. Well, did you walk in and out of the room? A. That's my recollection, that almost everyone did. I don't think anybody stayed in there the whole time.

Q. So that what you're telling us is that no one strung him up from the ceiling while you were there, is that right? A. That's right.

Q. Turn to Page 404.

I believe you indicated you didn't have any papers with you or any files of any kind, is that right, when you were in that room? A. I don't believe that I had any files of any kind.

Q. I want to ask you if this question wasn't asked by me and if you didn't give this answer: (Reading): Q. Did you ask any of the questions? A. I think I did. Q. Was there, did you have with you, any of the folders and files of the identification section of the Penitentiary of the Defendant at that time? A. No, I don't think so. I had a folder, but I don't think it had anything to do with him in particular.

Do you recall that question being asked and that answer given? A. No, I don't.

Q. Did you subsequently check to find out whether or not even the age of the defendant was accurate in this statement? A. I don't think so.

Q. As a matter of fact, much of the material that was [80] taken to put in this statement was taken out of some erroneous file and identification folders which were in that room, weren't they? A. No, I wouldn't—Will you ask that question again, please?

Q. I'm asking you if it isn't a fact that the material which was put into this record, such as his age, his prior residence, the fact that he had three prior convictions, were all erroneous, but that they were taken from erroneous folders and files which you had brought into the room? A. No, I surely don't recall anything like that.

Q. Well, have you checked, for instance, where it said he had three prior convictions, the record is clear that he didn't have three prior convictions. A. I don't know.

Q. Was there any attempt made to check back on that? A. When?

Q. After the statement was taken or at any time since that time. A. I certainly haven't made any effort to check it.

MR. HENNELLY: I have no further questions.

Redirect Examination by Mr. Kinder

Q. Mr. Little, did you tell the defendant Stidham what to put in his statement, as far as facts are concerned? A. No, not as far as facts. That's what I say, it's kind of hard to explain. I did not— I'm sure that I did not [81] tell him the facts or rather the allegations that are made in that thing but the only control that I would have exercised over the thing at all would have been to have him put it in a format that would have been consecutive or chronological or in the position that it should be in for a statement, but not as to what is in there, not as to the facts that are in there.

MR. KINDER: I have no further questions.

MR. HENNELLY: I have no further questions.

MR. KINDER: May this witness be excused?

THE COURT: Mr. Hennelly?

MR. HENNELLY: I have no need for him.

THE COURT: Mr. Little, you may be excused.

(WITNESS EXCUSED.)

THE COURT: Gentlemen, I think we're going to recess for the noon luncheon period. Court is in recess until 1:15.

(Thereupon, Court stood in recess for the noon luncheon period after which time Court convened again and the following proceedings were had in open Court, in the presence of the defendant and respective counsel:)

MR. KINDER: Thomas Jenneman.

THOMAS JENNEMAN,

being sworn, testified:

Direct Examination by Mr. Kinder

Q. Would you state your name, sir? [82] A. Thomas Jenneman.

Q. And what is your occupation? A. Police officer.

Q. City of St. Louis? A. Yes, sir.

Q. How long have you been in that occupation, sir? A. Twenty-seven years.

Q. Officer, do you recall where you were in the month of September, 1954 from the 23rd to, say, the 30th of September? A. Up at the Penitentiary.

Q. Were you there in connection with a prison riot which occurred there at the prison penitentiary? A. Yes, sir.

Q. Do you know the defendant, James Stidham? A. I remember him.

Q. All right, sir. Is he present in this courtroom? A. Yes, sir.

Q. Would you point him out? A. Right there, sir. (Indicating).

Q. Did you have occasion to see him on the 27th of September, '68? A. To the best of my knowledge I'd say yes.

Q. I'll show you what has previously been marked State's Exhibit No. A and ask you what that is. A. This does have my name on it.

Q. Would you state for the record what it is? [83] A. It's a statement made by Mr. Stidham.

Q. All right, sir. Were you present when that statement was written out? A. Yes, sir.

Q. Was it written by Mr. Stidham himself, sir? A. Yes, sir.

Q. Do you recall when you first saw Mr. Stidham on the morning of the 28th of—correction, on the 27th of September, '68? Do you recall what time it was, sir, when you first saw him? A. No, sir.

Q. Do you know how long he was present in the room in which this statement was written out before you took it—before you were present before he wrote that statement? A. I don't remember, sir.

Q. Do you know how he got from this place of confinement to the place where the confession was taken? A. He was conveyed there by a Highway Patrol trooper and myself.

Q. All right, sir. Do you know where inside the penitentiary—do you recall where inside the penitentiary he was located, where you went to get him, that is, sir? A. I don't recall the cell block, no, sir.

Q. Do you recall the conditions as they existed in the cell at the time that you went by to pick him up? A. In what respect?

Q. Well, sir, the physical make-up of the cell. Was [84] there furniture in the cell, do you recall? A. Whatever— The best I can remember, whatever articles are in the cell; toilet bowl and wash basin.

Q. Was there a bed in the cell, do you recall? A. Yes, sir, a bed.

Q. Was there water on the floor of the cell when you went in to get Mr. Stidham? A. I don't recall that, sir.

Q. Did Mr. Stidham complain to you at the time that you went to get him about not having been fed or that he had no water? A. Not that I recall.

Q. Do you remember what his physical condition was when you saw him, sir? A. No, sir.

Q. Do you recall whether he had any marks of any violence on his person, sir? A. No, sir.

Q. All right. You conveyed him then from the place where he was confined to another place. Where was this other place that you took him, sir? A. That was a building on the ball diamond.

Q. All right, sir. Who all— Do you remember who was in that building? A. I can't recall everybody, no, sir.

Q. Well, will you look again at the exhibit that I handed you? You still have it in your possession. There are several signatures to that document. Do you recall if those [85] persons were present, sir? A. I recall Lt. Eitzman, Patrolman Overbeck, Patroman Billings, Trooper Caldwell and Sgt. Little of the Highway Patrol.

Q. Were you continuously in this building with Mr. Stidham from the time that you brought him in there until he wrote that statement out? A. No, sir, there was times when I stepped outside.

Q. Do you know how long a period of time? You say "times you stepped out". Do you recall how many times? A. I don't recall how many times. At that time I was afflicted with a deep cough and the weather was extremely hot. We had a fan inside this building and I would go over and stand by that fan. Then I would step outside to try to get a little air.

Q. Were you outside for long periods of time, sir, do you recall? A. The best that I can recall, I would say, five or ten minutes.

Q. Now, during the time that you observed Mr. Stidham did you see anyone physically abuse him? A. No, sir.

Q. Did you hear him threatened in any way? A. No, sir.

Q. Was he promised anything or threatened in any way to induce him to write out this statement? [86] A. I don't recall.

Q. You don't recall whether he was? A. I don't recall anybody promising him anything.

Q. Do you recall anybody threaten to do any physical violence to him? A. No, sir.

Q. Did you handcuff him when you brought him down from his cell? A. Yes, sir.

Q. Did he remain handcuffed during the course of the interrogation? A. No, sir.

Q. Did you take the handcuffs off him? A. To the best of my knowledge they were taken off.

Q. All right, sir. Did you see him—I asked you before if he had been physically abused in your presence but did you see him hung by these handcuffs off any beam in that building or room, sir? A. No, sir.

Q. Did anyone dictate this statement to the accused or did he write it out himself, sir? A. If I remember correctly, he wrote it himself. I don't recall anybody doing any dictating.

MR. KINDER: I don't have any further questions.

Cross-Examination by Mr. Hennelly

Q. Officer, the first time that you saw the defendant was in Death Row. A. I don't recall where it was, the first time I saw him.

Q. Who was with you? Was Eitzman with you? [87] A. The first time I saw him?

Q. Yes. A. I don't remember, sir.

Q. Turn to Page 544.

I want to ask you if these questions were asked—and I'm referring to Page 554 of the transcript—and ask you—by Mr. Riley—when he tried the case down in the country: (Reading): Q. Where was the first time you saw him? A. In Death Row.

Do you recall that? A. No, sir.

Q. Now, let me ask you: Who gave you the orders to bring Stidham down to the baseball field at the athletic shack? A. I don't remember who gave the orders.

Q. How far did you have to go from Death Row to the athletic shack? A. I would say quite a distance. He was transported in a car.

Q. Was it pretty much of an isolated spot? A. No, I wouldn't say it was isolated.

Q. What was the nearest building to the athletic shack that you recall now? A. One of the cell buildings.

Q. Sir? A. One of the cell buildings. I don't recall which one.

Q. Was this athletic shack a one-room building? A. I believe it was. There might have been a smaller [88] room in there, I don't recall.

Q. And I believe your testimony is that you really don't recall too much about anything that happened there, is that right? A. My testimony now?

Q. Yes. A. I recall Mr. Stidham being questioned.

Q. Yes, but you don't— Do you remember whether he was standing or sitting at the time? A. He was sitting.

Q. And do you remember who did the questioning? A. We took turns questioning.

Q. Sir? A. We took turns questioning him.

Q. Did you do some of the questioning? A. Yes.

Q. Who were the other officers that were in that room with you? A. Lt. Eitzman, Sgt. Little of the Highway Patrol, Patrolman Elmer Overbeck, Patrolman Billings and Trooper Caldwell.

Q. What kind of weapons did you have? A. We didn't have any weapons.

Q. You didn't have any weapons with you when you took him into the— A. I had my sidearm with me.

[89] Q. Do you know whether or not that athletic shack had some corkball bats anywhere in it? A. I don't recall what type of equipment it had in it.

Q. It had general athletic equipment in it though, didn't it? A. Yes.

Q. When he left the Death Row was he handcuffed? A. Any time he was moved he was handcuffed while I was there. When he was moved other times when I wasn't present I don't know what condition he was moved in.

Q. Were his hands behind him when he was handcuffed? A. If I was with him, yes, sir.

Q. Officer, do you remember that besides your sidearm you had a riot gun with you? A. I remember during the days that I was up there I had a riot gun. I don't recall if I had it at that time.

Q. Turn to Page 552. I want to ask you if this question was asked you when the case was tried and if you gave this answer. I'm quoting now from page 552 of the transcript. (Reading): Did either you or Trooper Caldwell have any shotguns with you or pistols when you went up there? A. I had a riot gun. Q. You had a riot gun? A. And my sidearms. Q. And your sidearms? A. Yes, sir.

Do you recall those questions and that answer? A. I don't recall it but if it's in that document I said it.

[90] Q. Would you say that that was a pretty hot day, officer? A. Yes, sir.

Q. Sun was shining? A. Yes, sir.

Q. And I believe you indicated that you had been in the hospital, as a matter of fact. A. Yes, sir.

Q. For some time. A. Yes, sir.

Q. So that you stepped in and out of the room for some period of time, did you? A. Yes, sir.

Q. Now, during the time that the defendant was originally questioned didn't he, as a matter of fact, deny that he had anything to do with the killing? A. I don't recall, sir.

Q. Do you know how many times prior to this particular day he had been questioned? A. No, sir.

Q. I believe your testimony is that nobody told him anything to put in that statement, is that right? A. Yes, sir.

MR. HENNELLY: I have no further questions.

MR. KINDER: No further questions.

THE COURT: You may step down.

(WITNESS EXCUSED.)

MR. KINDER: May this witness be excused, your Honor?

THE COURT: Mr. Hennelly?

[91] MR. HENNELLY: No more.

MR. KINDER: Thank you, Tom.

ELMER OBERBECK,

being sworn, testified:

Direct Examination by Mr. Kinder

Q. Would you state your name, sir? A. Elmer Oberbeck.

Q. And what is your occupation, Officer? A. Police officer.

Q. St. Louis Police Department? A. Right.

Q. How long have you been in that occupation, sir? A. In my twentieth year.

Q. Officer, were you involved in the investigation of the murder that took place at the Missouri State Penitentiary in the month of September, 1954? A. I was.

Q. Who was your immediate superior at that time, sir? A. Lt. Walter Eitzman.

Q. Do you know where Lt. Eitzman is now, sir? A. He's retired. I don't know where he would be.

Q. All right, sir. I'll show you that which has been marked State's Exhibit A and I'll ask you to take a look at that and see if you can identify that for the record. Have you ever seen that document before, sir? A. Yes, my signature is on it.

[92] Q. All right, sir. What is it and where did you see it before? A. As near as I can recall, it was in the Missouri State Penitentiary in the month of September, 1954. I believe—really, I couldn't answer where the location was where I did see it.

Q. Did you see that document written, sir? A. I did.

Q. Who wrote it? A. James Stidham.

Q. All right, sir. Were you present when he wrote it? A. I was present.

Q. Do you recall, sir, when you first saw Stidham on the day of the 27th of September, the day that confession was written, that statement was written? A. I can't recall the time. It was during the daytime.

Q. Now, did you see him before that statement was written? A. Before then? No, sir.

Q. That is, on that day, sir. A. On that day? It's hard for me to remember, fourteen years.

Q. Did you assist in interrogating Mr. Stidham? A. I was there present.

Q. Did you ask him any questions? A. Not that I recall.

Q. All right, sir. Now, do you know how long he was [93] questioned before that statement was taken? A. It wasn't very long, maybe a half an hour.

Q. All right, sir. Was he continuously in your presence during that period? Did you ever leave the room for any reason? A. No, I never left the room.

Q. All right, sir. Did you during the period of time prior to the taking of this statement, the writing of this statement, did you see anyone physically abuse Mr. Stidham? A. No, sir.

Q. Did you hear anyone threaten Mr. Stidham? A. No, sir.

Q. Did you hear anyone offer Mr. Stidham any promises or any reward in return for his writing out this statement? A. No, sir.

Q. Did someone dicate the statement to Mr. Stidham? A. No, sir.

Q. Do you recall what instruction was given to him as far as the statement was concerned? A. To write in his own handwriting the facts pertaining to what he had been involved in. He was told to put that in his own handwriting, which he did.

Q. All right, sir. Was he handcuffed when you first saw him that day? A. This I can't recall.

Q. Do you recall whether he was handcuffed or not during [94] the interrogation, sir? A. I don't believe so.

Q. Did you see anyone strike him with a corkball bat? A. No, sir.

Q. Did you see him being strung up from a rafter or beam or member in the building? A. By his hands? No, sir.

MR. KINDER: No further questions, your Honor.

Cross-Examination by Mr. Hennelly

Q. Officer, do you remember testifying in this case down in Poplar Bluff? A. I remember that, yes, sir.

Q. Do you remember—This is an unusual question but do you remember a recess in the middle of your examination? A. No, I don't.

Q. Do you recall having had any conversations with the then prosecutor Riley respecting the testimony you had given to me on cross-examination prior to the recess? Do you remember anything about that? A. No, I don't.

Q. Now, Officer, was this the first time that you had ever questioned Stidham, the time that he was questioned in the athletic field and the time the statement was taken from him? A. I was in the room present. I didn't question him that I remember.

Q. Was that the only time you were present during his [95] questioning? A. This is the only time I can actually remember.

Q. And do I understand you correctly that when he first came into the room that he denied any participation in the murder? A. I don't recall that.

Q. Four twenty-one.

I want to ask you whether or not these questions were asked by me on cross-examination down in the country and whether or not you gave these answers and I'm quoting from Page 421 of the transcript.

(Reading): Q. Officer, do I understand correctly that when the Defendant first came in, he denied any participation in the murder? A. He denied any participation in the murder? Q. Yes. A. On the first account. Q. How long did he persist in that? A. We talked to him I imagine for about twenty-five minutes or thirty minutes, right along in there, and he continued to say that he had nothing to do with the murder of Donnell up to that time.

Do you recall me asking you those questions and you giving those answers? A. I cannot recall it.

Q. Well, that was some time ago. Would you say that your memory was better then than it is now? A. At the immediate time, yes, sir.

Q. Then I believe your testimony—and I asked you the next question: (Reading): Q. And then after that, he made [96] an oral statement in which he admitted his complicity in it, is that right? An oral statement, in which he did say he had something to do with the murder? A. That is right. A. I believe he made an oral statement first.

Q. And your testimony to the Judge is that even though he stayed there for half an hour denying that he had anything to do with the murder that he—without anybody hitting him, without anybody striking him in any way, without anybody making any promises of any kind—admitted a complicity in the murder. A. This is the way it went.

Q. I see. You knew, of course, that this man had been in the penitentiary for years, didn't you? A. I knew he was a prisoner there. I didn't know how long.

Q. Were you present when that statement was written by the defendant? A. Yes, sir.

Q. Do you recall whether or not you or anyone else made any suggestions to him as to what he should put in it? A. Not no suggestions, no, sir.

Q. I'm going to ask you to look at the statement and tell me whether or not there isn't something scratched out in the statement and then a correction made on it. A. I see a word scratched out.

Q. Now, I'm going to ask you if it isn't a fact that [97] one of the officers told him they didn't want him to write what he was about to write and told him what to put in after that; do you recall that? A. No, sir, I don't.

Q. How close were you to the defendant when he was writing that statement out? A. Ten, twelve feet. It's hard to remember.

Q. Were you all sitting around a table? A. It seems like there was a table in the room.

Q. Did you leave the room at any time? A. Not that I remember.

Q. Did anybody leave the room at any time? A. Not that I remember.

Q. Was it a warm day? A. I couldn't remember that either.

Q. I want to ask you with respect to the particular room where the statement was made, this athletic shack, is that a rather isolated area? A. Oh, it's off the ball field. It was a clubhouse, if I remember right, for their—the ball diamond.

Q. It was not in the penitentiary proper? A. It was within the confines area of the penitentiary.

Q. But not within any of the administration buildings or any of the other buildings. A. It was immediately adjacent to them.

Q. Who was it that made the suggestion that perhaps [98] they better take the defendant Stidham down to the athletic shack rather than questioning him in the classification room or in any of the other rooms which were part of the complex proper? A. I never heard that.

Q. You didn't know who made the original decision to go to the athletic shack? A. Well, our decision would naturally come from the highest in command there but I never heard the remark.

Q. Wouldn't it have been any—I guess there weren't any corkball bats in the classification room or any of those places? A. Not that I remember.

Q. And the classification room and the other areas were possible to be seen and observed occasionally by people too, weren't they? A. Classification room, I don't know what you mean.

Q. Well, do you remember that there had been some interrogation of the other prisoners in the classification room? A. Well, you're naming a room I wouldn't be able to identify by the room, classification.

Q. Well, did you take part in any interrogation of any other witnesses, any other defendants? A. I did.

Q. And how many of them were questioned in the athletic [99] field—shack? A. There was numerous ones questioned in there.

Q. And did you question them in any other part of the penitentiary? A. I talked—or I was with a group that were questioning them in other parts.

Q. I presume in the course of all the time that you were there questioning all of these different defendants you never did see any officer or any member of the State

Highway Patrol or anyone in authority ever hit, kick or beat or threaten any of those people, did you? A. No, sir.

MR. HENNELLY: That is all, officer, thank you very much.

MR. KINDER: Thank you, Officer Oberbeck.

Your Honor, may this witness be excused?

THE COURT: Mr. Hennelly?

MR. HENNELLY: Yes, that is all.

(WITNESS EXCUSED.)

CHARLES BILLINGS

being previously sworn, testified:

Direct Examination by Mr. Kinder

THE COURT: You're still under oath.

Q. (By Mr. Kinder) Would you state your name, sir? A. Detective Charles Billings.

Q. And how long have you been on the St. Louis Police [100] Department, sir? A. Twenty-five years the first of November. I was off for a short time and came back.

Q. All right, sir. Were you involved in the investigation of a murder of one Walter Lee Donnell at the Missouri State Penitentiary in the month of September, 1954? A. Yes, sir, I was.

Q. Who was your immediate supervisor or superior at that time? A. Lt. Walter Eitzman.

Q. Do you know where Lt. Eitzman is now, sir? A. Sun City, Arizona.

Q. Do you know how long he's lived there? A. He retired in about February or March of this year and moved out there immediately.

Q. All right, sir. Let me show you, if I may, please, that which has been marked State's Exhibit A. I'll ask

you if you've ever seen that document before. A. Not this particular—the original I had seen.

Q. You've seen the original of that document? A. Yes, sir.

Q. That is your signature that appears there, sir? A. Yes, sir.

Q. Do you remember seeing the author of that document write it? A. Yes, sir.

[101] Q. Who was the person who wrote it, sir? A. William Stidham; James William Stidham.

Q. Do you know where physically inside the Missouri State Penitentiary this statement was written? A. In the field house, at the athletic field.

Q. All right, sir. And do you remember the persons who were present other than yourself? A. Lt. Eitzman, Sgt. Little, Trooper Caldwell, Elmer Oberbeck, Thomas Jenneman and myself.

Q. I know it's hard to ask you this question, sir, but do you happen to recall what time of day Mr. Stidham was first brought into the field house? A. No.

Q. Do you recall whether it was before or after the noon hour, sir? A. If memory serves me, I think it was after.

Q. After the noon meal? A. (Nods head.)

Q. Do you remember his physical condition at the time he arrived at the field house, sir? A. It appeared normal.

Q. Appeared normal to you, sir? Had you had occasion to see him before this date? A. Not that I can recall.

Q. All right, sir. Now, the document states that that statement was taken at 2:35 p.m. Assuming your [102] calculations, that it was shortly after the noon hour that you first saw him, did you have occasion to leave the room in which he was physically located in between noon and

2:35 p.m.? A. I could have been in and out of there several times.

Q. Do you recall whether you were gone for any protracted period of time? A. No.

Q. How long— A. I wouldn't have been gone for any long period of time.

Q. May I correct the record? I made the same mistake Sgt. Little did. It's 12:35, not 2:35, I'm talking about.

During the course of the time, sir, that you observed Mr. Stidham was he physically abused? A. No, sir.

Q. Did anyone threaten him in your presence? A. No, sir.

Q. Did anyone promise him any reward or any easy treatment if he would write out a statement in longhand? A. No, sir.

Q. Was this statement dictated to Mr. Stidham or did he write it of his own volition? A. To my recollection he wrote it of his own wording and I didn't hear anyone dictate anything to him.

Q. Did Mr. Stidham complain to you or any of the [103] officers in your presence that he was hungry or thirsty or that— A. No, sir.

Q. Did he make any complaints concerning his living conditions? A. No.— May I retract that? I do recall someone had complained about the food not being too good at the penitentiary but not any particular instance.

MR. KINDER: I see. I don't believe I have any further questions.

Cross-Examination by Mr. Hennelly

Q. Officer Billings, at the time of this incident, and presently, you were of course aware of certain rules which the Police Department and certain police manual rules, federal, civil rights section, and so on, which really forbade

anyone from hitting or beating a witness, wasn't there? A. That's true; yes, sir.

Q. And this was well known to all the officers, wasn't it? A. That's correct.

Q. Now, on the day in question had you been a party to any prior interrogation of Stidham? A. No, sir, not—I don't think I had seen him at all before that.

Q. Do you know who had previously questioned him? A. No, sir, I don't.

Q. How many days after the riot did he sign this statement? [104] A. Four, three or four days, I guess, I don't recall.

Q. Were you aware, aren't you, of the fact that he had been questioned in the interim? A. We talked to him. I was aware that—possibly that somebody had, I wouldn't know who.

Q. Now, did— When he went down to this athletic shack were you already inside the shack or did you come in after he was there? A. I don't recall. I might have been or I might have come down with him.

Q. Can you give us any idea of the dimensions of this room? A. Well, as I can recall, we were in a large room and there was a divided building. Part of it was fenced off as an equipment center. Where we were was evidently a type of recreation room.

Q. When you say "equipment" you mean bats and things like that? A. I don't know what was in there. It was locked.

Q. Well, do you recall me asking you about whether or not there were any bats there, and when I say "bats" I don't mean birds, when we tried the case, do you? A. No, sir, I don't.

Q. Page 563 of the transcript. I'm going to ask if I [105] didn't ask this question and if you didn't give this answer down in the country.

(Reading): Q. Were there any sticks in that building which could be used for cork ball games, did you see any of those around there? A. There were bats in the place. Q. Bats? A. There was the sporting, sports office. Q. Did anybody take any of those bats, or any of that sporting equipment and make use, fool around with it in front of Stidham? A. No, sir.

Now, do you recall those questions being asked you and you giving those answers? A. I must have given those answers.

Q. Now, I want to ask you how long was he questioned orally before anything was put on paper? A. I have no way of recalling how long it was.

Q. Well, I want to ask you, on Page 564, if this question was asked—these questions were asked and these answers given by you.

(Reading): When Stidham was first questioned, did he deny having anything at all to do with the death of Walter Lee Donnell? A. When he was first questioned. Q. How long did he persist in that position Officer? A. Oh, about twenty to twenty-five minutes.

Do you recall those questions being asked and that answer being given? [106] A. I don't actually recall it but it must be if the transcript of the trial—those would be the answers that I gave to the questions.

Q. And your testimony is that at that point, after the twenty-five minutes, he wasn't lifted up, suspended from the rafters of the athletic building in an isolated area away from the administration building, hit with the corkball bats and then said that he would make the signed statement for you; that did not happen, did it? A. No, sir.

Q. Do you remember with respect to the statement, did anybody tell the defendant anything to put in there? A. Not that I can recall.

Q. Had there been any conversations between the defendant and any of his interrogators with respect to anything at all to put in there? A. No.

Q. Not even the method or manner in which it would be written? He just wrote it of his own free will, made a complete— A. I don't recall he was told how to put anything in there.

MR. HENNELLY: I have no further questions.

MR. KINDER: I have no further questions.

THE COURT: You may step down.

(WITNESS EXCUSED.)

MR. KINDER: I'd like to call Mr. Hennelly.

[107] THE COURT: This perhaps ought to be in the record. There's a tenet of the legal ethics that says it's improper for a lawyer to testify in a case where he's prosecuting or defending it. This isn't before a jury and I don't anticipate that we'd have any difficulty on this score but I do want to bring it to your attention that there is such a thing. Now it's true you're being called as a witness for the adverse side and you're not attempting to testify in your own part of the case but is there any objection on anybody's part?

MR. HENNELLY: No objection. My understanding is that the prosecutor is calling me on what is strictly the proper interest of the administration of justice with respect to part of the motion. I have no objection about it at all.

THE COURT: All right.

MARK HENNELLY,

being sworn, testified:

Direct Examination by Mr. Kinder

Q. Mr. Hennelly, you were the court-appointed attorney for the defendant then, now the movant, for James William Stidham in the case of the State versus Stidham, were you not? A. Yes, I was.

Q. Now, Mr. Hennelly, did you at that time have associated with you in the practice of law a gentleman by the name of F. Neil Aschemeyer? A. Yes, I did.

Q. What was your business relationship with him at [108] that time, sir? A. Well, he was associated with me in the business. He tried some cases for me. He assisted me in the writing of several briefs after the drawing up of certain motions. That was—

Q. Had you ever prior to the 3rd day of October, 1955 discussed the particulars of the Stidham case with Mr. Aschemeyer? A. Yes, I did.

Q. And was he generally familiar with the case and the facts, sir? A. Yes, I think he assisted me too in writing up a motion for a new trial, either he or Sidney Glaser (sic) did.

Q. Now, the court records reflect, sir, that Mr. Aschemeyer appeared in the Circuit Court of Butler County on the 3rd of October, 1955 and presented the motion for a new trial and was present with Mr. Stidham at the time of his sentencing. For the Court's edification, this is found on Page 775 of the transcript, and 776. Was this done so at your request, sir? A. Yes.

Q. And had you discussed this matter with Mr. Stidham prior to— A. No, I had not. I was— I thought that I was going to be free on that occasion but I was in the trial of another lawsuit so I employed—at my expense I sent him down there for the purposes of the sentencing.

[109] MR. KINDER: I don't believe I have any further questions.

MR. HENNELLY: Your Honor, in view of the State's testimony I want to recall the defendant.

DEFENDANT'S REBUTTAL EVIDENCE:

JAMES WILLIAM STIDHAM,

being previously sworn, testified:

Direct Examination by Mr. Hennelly

Q. Mr. Stidham, I want to hand you what has been introduced into evidence as State's Exhibit A and I'll ask you whether or not you recognize the photostat of it that you have in your hand. A. Yes, sir.

Q. Tell his Honor the circumstances under which that was written. A. After I had been hung up by the hands and beaten, as I described a short while ago, I agreed to write this statement they would dictate to me.

Q. Now, I wanted to ask you: Look at the statement, Mr. Stidham, and tell me what does the statement say with respect to your age? A. It says I'm twenty-five years of age.

Q. Now, on the date in question, in truth and in fact, how old were you? A. I was twenty-eight.

Q. Twenty-eight years. Did the officer who dictated the statement to you tell you to put down twenty-five? A. Yes, sir.

[110] Q. Did he have in front of him certain records from the penitentiary? A. Yes, sir.

Q. I want you to look and tell his Honor what it says with respect to any prior convictions that you have. A. It says three prior convictions for Dyer.

Q. And in truth and in fact how many prior convictions did you have on that occasion? A. Actually, I had two but one of them was nullified.

Q. So you really only had one. A. Yes, sir.

Q. But, in any event, you did not have three. A. No, sir.

Q. Can you tell his Honor the circumstances under which you wrote three prior convictions for the Dyer Act? A. I was directed to.

Q. Sir? A. I was directed to by the interrogating officer.

Q. Did the same officer that had certain records in front of him— A. Yes, sir.

Q. Now, I want you to look at the exhibit and see if you can find the spot where there is something scratched out. A. Yes, sir.

Q. Tell his Honor the circumstances under which that was scratched out. A. Well, to the best of my memory, one of the officers [111] told me to put something there and I started to put it there and another one—which I think was Lt. Eitzman—he directed me to put another sentence in there.

Q. So you scratched it out. A. Yes, sir.

Q. Now, did— At any of your interrogations did any of the officers tell you that you could have a lawyer if you wanted one? A. No, sir.

Q. Did any of them get you a lawyer? A. No, sir.

Q. Did they tell you at the time of your arraignment, the second arraignment on the Indictment—that it could be held up until such time that you could confer with your lawyer? A. No, sir.

Q. Did anyone advise you of any constitutional rights at the time of any of these interrogations? A. No, sir, nobody did.

Q. Did anyone tell you at the time that Exhibit A was arranged that you didn't have to make any statement of any kind? A. No, sir, they always insisted that I had to make one.

Q. I see. A. Can I offer something?

Q. Sir? A. Can I offer something? This also says I'm from Kansas City, Missouri, this statement does. I have never lived in Kansas City, Missouri, not one [112] day.

Q. Can you tell his Honor the circumstances under which that was in there? A. I was ordered to put that in there.

Q. Sir? A. I was ordered to put it in there.

Q. Is there any truth in the statement? A. No, sir.

Q. I'm talking about— A. To my knowledge, I don't know anything about the facts of the crime, you know, other than what I was told, that—this interrogation here, told what to put in. I have never touched Donnell. I've never, say, been within a foot or two or three foot of Donnell. I've never even spoke to the man. In fact, I'm just as innocent of this crime as you or anybody else in this courtroom.

MR. HENNELLY: I have no further questions.

MR. KINDER: No further questions.

MR. HENNELLY: Does the Court have any questions of the defendant, your Honor?

THE COURT: You may step down.

(WITNESS EXCUSED.)

MR. HENNELLY: We also wanted to read something from the transcript.

Your Honor, on behalf of the defendant I wanted to [113] put into evidence particularly Page 418 of the transcript in which Major Eitzman, in answer to a question on redirect examination by Mr. Riley, said the following:

From the bottom of Page 417. (Reading): Did you tell him what to put in that statement regarding the facts of the killing of Donnell? A. Not what to put in. I

told him what we desired as far as the facts were concerned, around the incident of the crime.

Then, in all fairness, he said: (Reading): Q. But it was, the use of the words in the statement were his own and not yours? A. Exactly.

Is there a part of this transcript a picture of his cell?

MR. KINDER: I do not— The only exhibit I have, Mr. Hennelly and your Honor, are these which are attached to—and this is of the murder weapon itself, and some correspondence.

I assume that those photographs are with the file in the Supreme Court, your Honor, because I do not have copies of them. I have some photographs but they're not marked so I have no way of telling.

MR. HENNELLY: Is there any access that the Court has to those photographs?

THE COURT: Have either of you called upon the Supreme Court to see if you could see these photographs?

[114] MR. KINDER: I have not but I can, your Honor. I'm sure that they'll let me have access to them, to have whichever ones you want duplicated, Mr. Hennelly.

MR. HENNELLY: Well, could I ask the Court then to—if counsel could and if there's any expense we'd be happy to pay it—for a photograph of Mr. Stidham's cell? (To defendant): Is that what it was?

MR. STIDHAM: Yes, sir.

MR. KINDER: I'll attempt to obtain all of the photographs so the Court can have those with the exhibits with the transcript here.

THE COURT: All right.

MR. KINDER: Now, as I understand it, your Honor, this transcript is a part of the official court file, this transcript?

THE COURT: Yes.

MR. KINDER: And, if I may, I ask the Court to take notice of the whole transcript but in particular I'd like to call the Court to several pages which I think call for some special attention, if I may.

I would like the Court to specifically observe Page 486, 487 wherein the procedure used by the trial court in determining the voluntariness of the confession outside of the hearing of the jury was as set forth in detail.

THE COURT: That's Page 486 and 487?

[115] MR. KINDER: Four eighty-six and four eighty-seven, your Honor.

I would like also the Court to observe, and I'm sure the Court will read the whole transcript—but Page 775 and 776 in regard to the matters concerning Mr. F. Neil Aschemeyer and his presence at the time of sentencing of Mr. Stidham.

That's all I have, your Honor.

MR. HENNELLY: That's all we have, your Honor.

I would presume that the Court will want this matter briefed by counsel?

THE COURT: Extensively.

MR. HENNELLY: And I would— The defendant has requested me to ask the Court whether or not it would be possible for him to remain in the City Jail until such time as the Court makes a ruling?

THE COURT: Oh, no, that would not be possible. I would anticipate it would take some time. I'd have to read the transcript of this case. I have to— First of all you have to prepare a brief.

MR. HENNELLY: That's right, your Honor.

THE COURT: The State will have to prepare a brief and you will have the right to answer.

MR. HENNELLY: Yes, your Honor.

MR. KINDER: It's the other way around.

[116] MR. HENNELLY: I'll prepare the first brief.

THE COURT: He has the right to file the first brief, then you file a brief, then he files an answering brief. This would comprehend a matter of three or four months, Mr. Hennelly; no, that motion is overruled.

Very well.

MR. HENNELLY: Well now, with respect to the Court's wishes with respect to the brief, the timing. When will the Court want the movant's brief, your Honor? I'll have to inquire as to Mr. Hesse's schedule.

THE COURT: I don't want to press you too much on it but when can—do you feel you can prepare this brief?

MR. HENNELLY: A minimum of thirty days, your Honor.

THE COURT: All right, you'll have thirty days to file your original brief. How about the State?

MR. KINDER: I'd ask for thirty days after I receive the brief, if I may, your Honor.

THE COURT: That's all right.

MR. HENNELLY: Fine.

THE COURT: And then you'll want time to file—

MR. HENNELLY: Fifteen.

THE COURT: Fifteen days to file an answering brief.

MR. HENNELLY: Right.

THE COURT: All right. Incorporate that in your Court memorandum here.

[117] MR. HENNELLY: Very well, your Honor.

I might say, for the purposes of the record, that the defendant has indicated to me that if the Court saw fit to make a finding which would necessitate any further findings in this record that he is perfectly willing for this Court to make those findings or for this Court to do whatever is necessary to completely take the matter to a conclusion. I say that only in an advisory way and I say that without regard to what the rules are or anything else but the de-

fendant wanted me to tell the Court that; isn't that right, Mr. Stidham?

MR. STIDHAM: Yes.

THE COURT: All right.

Well now, do I understand there is no further evidence to come before the Court either documentary or oral evidence in this cause?

MR. HENNELLY: That is right, your Honor.

MR. KINDER: That is right, your Honor.

THE COURT: And the only testimony—the only evidence in this cause has been the sworn testimony and the exhibits admitted into evidence here this day in this courtroom?

MR. HENNELLY: Your Honor, there is another bit of stipulation which Mr. Stidham and Mr. Hesse and Mr. Kinder and I entered into in Jefferson City which is presently unavailable [118] only for the reason that the court reporter is inaccessible. This has to do with the attempt on the part of Mr. and Mrs. Stidham to visit the defendant.

MR. KINDER: Well, the matters which we stipulated to, your Honor, were matters—were agreements with the defendant which would save time, matters which we have no conflict about, his parents not being able to see him and certain items and matters which are matters of record outside the official records of this court, so—

THE COURT: That's to be taken into consideration in this hearing, this evidence; is that right, that stipulation?

MR. HENNELLY: Yes.

MR. KINDER: Yes.

Also, I forgot to offer into evidence Exhibit A but I think it's surplusage because it is a record of this Court.

MR. HENNELLY: Mr. Stidham raises another question.

MR. KINDER: May I present those to the Court?

THE COURT: The whole transcript?

MR. KINDER: Yes.

MR. HENNELLY: Mr. Stidham raises another question, that—

MR. KINDER: You talking about the other photographs?

MR. HENNELLY: Yes.

[119] MR. KINDER: I'll make an attempt to provide those for the Court because they're lacking in this file.

THE COURT: How many will you provide?

MR. KINDER: I don't—

MR. NOLAN: There are eleven offered and accepted. I show it eleven indexed, eleven photographs.

MR. KINDER: Which were offered into evidence.

MR. HENNELLY: Mr. Stidham now raises the question about the fact that there were some other exhibits which were— Well, in any event, may we prevail upon Mr. Kinder to get photostats of either the—another picture or not, some photostats of all of the exhibits because really this exhibit is not a complete exhibit because it doesn't include everything that was introduced.

THE COURT: Well, then it might be well to get photographs, duplicates, of all exhibits submitted in the trial of this case.

MR. KINDER: I believe the problem is they went on up with the transcript on appeal and evidently are retained by the Court and I'll make every attempt to provide them for the Court, your Honor.

THE COURT: This cause will be taken as submitted. Prepare the memorandum.

Thereafter, and on the 14th day of April, 1969, [120] Memorandum Opinion of Court, Including Findings of Fact and Conclusions of Law as to Defendant's Amended Mo-

tion to Set Aside His Conviction Under Supreme Court Rule 27.26 was filed, as follows: (Caption and signature omitted)

MEMORANDUM OPINION OF COURT, INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO DEFENDANT'S AMENDED MOTION TO SET ASIDE HIS CONVICTION UNDER SUPREME COURT RULE 27.26

"Under Supreme Court Rule 27.26 (1) this court is required to make findings of fact and conclusions of law on all issues presented on the movant's Amended Motion. As Rule 27.26 (a) provides that proceedings under this Rule is civil in nature and that procedure is to be governed by the Rules of Civil Procedure, resort may be had to Rule 73.01 (b) which allows the preparation and filing of an opinion containing findings of fact and conclusions of law. This being so the grounds presented in the Amended Motion will be considered and findings and authorities as to the facts and law will be made as applied to each point raised, rather than utilization of the procedure of making findings of fact first followed by conclusions of law.

"The Court finds that the movant, while serving a twenty-five year sentence in the Missouri State penitentiary, for robbery, was involved in the prison riot at said institution on September 22, 1954, wherein events participated in by movant, and others, culminated in the violent and unlawful [121] death of one Walter Lee Donnell, a prison inmate. The movant was tried and convicted of the charge of first-degree murder of said deceased in July, 1955, in the Circuit Court of Butler County, Missouri and was sentenced to life imprisonment. This conviction was ap-

pealed to the Supreme Court of Missouri (State vs. Stidham, Mo., 305 SW 2nd 7) and was affirmed by that Court. Thereafter the movant on March 9, 1964, filed a Motion to Vacate and set aside his sentence under Supreme Court Rule 27.26 in the Circuit Court of Butler County, Missouri, and the Motion to Vacate was denied without an evidentiary hearing being afforded. An appeal followed and the Supreme Court of Missouri affirmed the trial Court's judgment. State vs. Stidham, Mo., 403 SW 2nd 616. Thereafter movant filed a second motion under Rule 27.26, and an evidentiary hearing again was denied. On appeal the Supreme Court of Missouri reversed and remanded for purposes of an evidentiary hearing in compliance with Rule 27.26. State vs. Stidham, Mo., 415 SW 2nd 297. Thereafter the movant, by change of venue, lodged and filed his motion under said rule in the St. Louis City Circuit Court on September 3, 1968. On September 27, 1968, a pre-trial conference was held in Division No. 20 of said Court, wherein the parties were represented by attorneys. An amended motion was filed by movant thereafter. On December 5, 1968, an evidentiary hearing was held in said Court wherein movant was present and was [122] represented by his attorney Mark Hennelly and the State represented by Byron Kinder, Prosecuting Attorney for Cole County. In addition to the appearance of witnesses, stipulation of facts were entered into and offered and received in evidence. Recitation of facts adduced at this hearing will hereinafter be set out in these findings where relevant and appropriate to subject under discussion.

"A review of the scope and law under this Rule follows: A motion under Rule 27.26 will not reach trial errors and same will not be considered under the provisions of said rule. State vs. Macon, Mo., 403 SW 2nd 630. Nor may a

Motion to Vacate under this rule be used as substitute for appeal or as motion for new trial or as a second appeal. State vs. Statler, Mo., 383 SW 2nd 534; State vs. Durham, Mo., 416 SW 2nd 79. The relief available under this rule is coextensive with, and no broader than, that obtainable by habeas corpus. State vs. Turner, Mo., 353 SW 2nd 602. The burden is upon movant in motion under Rule 27.26 to establish facts which would entitle him to relief. State vs. Brizendine, 433 SW 2nd 321.

"Moving now to the points set forth and relied on by movant in his Amended Motion, movant in Appendix A attached to his motion, paragraph 1, contends a) that the trial court's procedure for determination of voluntariness of the confession admitted into evidence on the trial did not comport [123] with minimum standards of due process of law in that no specific finding of voluntariness was made by the judge prior to submitting the issue to the jury and b) the overwhelming evidence was that the statement was involuntary because of coercion exerted on movant.

"Concerning subparagraph A, the record shows, and this Court finds, that prior to admission of movant's confession into evidence, the Court excused the jury and proceeded to hear sworn testimony, outside the presence and hearing of the jury, touching and bearing upon the voluntariness of the alleged confession. There was voluminous testimony heard and many witnesses sworn, the movant being afforded ample opportunity to present whatever evidence he had on this issue. The evidence adduced was highly conflicting and divergent. At the conclusion of this hearing at Page 486 of the record the following oc-

curred: "The Court: 16 and 16-1, it is the Court's opinion that the matters concerning the statement should be offered in the presence of the jury, subject of course to any attacks as to its credibility by the defendant. The defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the jury, that the statement is and should be admissible in evidence. . ."

"MR. HENNELLY: *In other words, the Court is overruling my motion, and request of the Court to hold as a matter of law, that those statements were involuntary is that right*?

"THE COURT: *THAT IS RIGHT. Mr. Sheriff will you bring the jury back in*?" (Emphasis added.)

"Movant's contention that the trial court failed to find specifically that the confession was voluntary this Court finds is untenable since the Court found specifically that the confession was not involuntary. Webster's New Collegiate Dictionary, 1961, defines "involuntary" as "not voluntary", "not done, given, etc., willingly by choice, or by act of the will. . ." Under the law of this State the Court followed the correct procedure in determining the issue of voluntariness of the confession and specifically made a finding relative thereto and this Court now so finds that the correct procedure was utilized. State vs. Glenn, Mo., 429 SW 2nd 225 (29); State vs. Aston, Mo., 412 SW 2nd 175 (19); *State vs. Washington*, Mo., 339 SW 2nd 109 (12). In State vs. Stidham, Mo., 305 SW 2nd 7, this issue on voluntariness was presented on appeal of the conviction and the decision on the question was adverse to movant. Thus the matter the Court finds is no longer

viable and litigable. State vs. Statler, Mo., 383 SW 2nd 534 (8, 9); Crawford vs. State, Mo., 436 SW 2nd 633.

"As to subparagraph b concerning the averment that [125] "the overwhelming evidence was that the statement was involuntary because of coercion exerted on movant", this contention was raised and profusely litigated in State vs. Stidham, supra, and the Court finds is no longer open to question here. State vs. Statler, supra; Crawford vs. State, supra.

"It should be noted that the evidence concerning the issue of voluntariness was greatly conflicting and was to be resolved by the trial court in the first instance and the jury in the second having regard to the credibility of the witnesses. This issue should now be considered closed, and this Court finds it to be so.

"Next movant contends that he was denied assistance of counsel at critical stages of his proceeding, listing them (a) through (d) in his amended motion. The record shows and this Court finds that while movant was an inmate in the penitentiary a prison riot began on September 22, 1954, and on September 27, 1954, after questioning by authorities, the movant confessed to his part in the murder of Walter Lee Donnell. Thereafter he was arraigned on September 29, 1954, and counsel was first appointed for him on November 23, 1954. He stood trial in July, 1955, on the murder charge. The movant claims he was entitled to counsel the day after the prison riot, and at each stage thereafter.

"The Court finds that is no merit to the contention that movant was entitled to counsel the day after the [126] penitentiary riot. In State vs. Edwards, Mo., 435 SW 2nd 1, it was held that Escobedo and Miranda did not apply to

first-degree murder trial in December, 1965. Also see State vs. Holland, Mo., 412 SW 2nd 184 (4). The Court finds that movant was not denied assistance of counsel at any critical stage in the proceedings against him.

"The same finding applies to the contention regarding his interrogations by State authorities. State vs. Gray, Mo., 432 SW 2nd 593 (5, 6); State vs. Chernick, 303 SW 2nd 595. Since movant pleaded not guilty at the arraignment, even though he requested advice of counsel, the Court finds that none of his constitutional rights were infringed upon by failure of the Court to appoint counsel. State vs. Donnell, 430 SW 2nd 297, (3, 12, 14); State vs. Brizendine, Mo., 433 SW 2nd 321 (7). The Court finds that the failure to appoint counsel for movant did not impair any of his constitutional rights in any respect. The record shows that Mr. Mark Hennelly, after his appointment as movant's attorney on November 23, 1954, ably and sedulously represented movant both in pre-trial matters and on the actual trial. The Court finds that ample time was afforded movant's attorney to investigate the facts of the case and to prepare for trial and to counsel with and advise movant. Movant's contention that an attorney would have seen bruise marks on his body is not persuasive. The record shows that Mr. F. Neil Aschmeyer, an associate of Mr. [127] Mark Hennelly, was present when allocution and sentencing took place, no objection being raised by movant to this procedure and thus movant was represented at the sentencing. The Court finds that nowhere in the record does it appear that movant was deprived of his constitutional rights to counsel, nor that movant was in any wise prejudiced by failure to appoint counsel sooner.

"Next movant contends that the State used perjured testimony in the trial, and further that evidence was suppressed concerning promises made for State's evidence. The record is barren of facts to support such allegations and the Court finds that same are without merit. State vs. Garton, Mo., 396 SW 2nd 581; State vs. Thompson, 396 SW 2nd 697; State vs. Stidham, Mo., 402 SW 2nd 616; State vs. Engberg, Mo., 391 SW 2nd 868 (6, 7).

"Next, movant's contention that because of circumstances under which his confession was made and used he was compelled to be a witness against himself is without merit. Movant could either take the witness stand to testify in his own behalf or not as he saw fit, and no prejudice against him is demonstrated in the record under this assignment, and the Court so finds. State vs. Stidham, Mo., 305 SW 2nd 7.

"Movant next contends that his constitutional rights under Miranda vs. Arizona were violated in various respects, however, the Court finds that Miranda does not apply retrospectively. [128] State vs. Gray, Mo., 432 SW 2nd 593. This case was tried long before Miranda vs. Arizona was decided.

"Movant's next assignment of error in Paragraph 6, A and B of amended motion, concerning the trial court's submission of the crime of conspiracy included in the instructions numbered 4 and 5 when not included in the indictment the Court finds is without merit. State vs. Stidham, Mo., 305 SW 2nd 15, 16; State vs. Spica, Mo., 389 SW 2nd 35, 40; as is the contention that movant was not adequately advised of the nature and cause of the accusa-

tion. State vs. Smith, Mo., 411 SW 2nd 208 (7); Crawford vs. State, supra.

"Movant next attacks instruction number 6 on the voluntariness of the confession in Paragraph 7 of his motion, stating it shifted the burden of proof to movant and failed to take into account "mental duress" as well as physical coercion. This instruction was approved in State vs. Stidham, 305 SW 2nd 7, and discussed in State vs. Williams, Mo., 369 SW 2nd 408, wherein the Court there said that the facts in Stidham were different from those in Williams. In State vs. Glenn, Mo., 429 SW 2nd 225, 237, the Court held that while the instruciton on voluntariness did not take into account the "defendant's physical condition and his sentience or awareness at the time of making any statement" it was not error for failure to refer to defendant's physical condition. In State vs. Pughe, Mo., 403 SW 2nd 635, the Court held that [129] voluntariness of a confession is a collateral issue and an instruction on this subject is not required as a part of the law of the case. The Court at Page 641 pointed out that if there is conflicting evidence before the jury concerning the voluntariness of a confession, the defendant upon request, would be entitled to an appropriate instruction on the issue of voluntariness. The Court finds this right was not availed of by movant. In State vs. Smith, Mo., 411 SW 2nd 208, the Court held that allegations of error relating to instructions to jury, being allegations of trial errors only, will not be considered on motion to vacate judgment and sentence under Rule 27.26. The Court finds that this assignment is without merit.

"In determining whether movant's constitutional rights were infringed upon by the State in securing the

confession used in this case, the totality of the circumstances must be taken into consideration, and under conflicting evidence, this question was one for the trial court and the jury. State vs. Hester, Mo., 425 SW 2nd 110; Crawford vs. State, supra.

"Having considered and disposed of all the points raised in movant's amended motion to vacate under Rule 27.26, and having discussed both the facts as they relate to the assignments of error and the law involved herein, the Amended Motion under said Rule now is overruled."

[130] (Filed—April 14, 1969.)

COURT MEMORANDUM

Thereafter, and on the 14th day of April, 1969, the Court entered the following Memorandum and Order: (Caption and signature omitted)

"Defendant-Movant's Motion to Set Aside Judgment and Sentence Under Supreme Court Rule 27.26 is overruled. Memorandum Opinion of Court, Including Findings of Fact and Conclusions of Law as to Defendant-Movant's Motion is attached herewith."

(Filed—April 14, 1969.)

MOTION TO APPEAL AS A POOR PERSON AND FOR AN ORDER REQUIRING THE COURT REPORTER TO PREPARE THE TRANSCRIPT OF THE EVIDENTIARY HEARING WITHOUT COST TO MOVANT.

Thereafter, and on the 23rd day of April, 1969, Motion To Appeal as a Poor Person And For An Order Requiring the Court Reporter To Prepare The Transcript Of The Evidentiary Hearing Without Cost To Movant was filed, as follows: (Caption and Signature omitted)

"Comes now MARK M. HENNELLY, attorney for the above named movant, JAMES WILLIAM STIDHAM, pursuant to Sup. Ct. Rule 27.26 and states to this Honorable Court that movant is an indigent and a poor person within the meaning of the law and that he does not have funds wherewith to perfect his [131] appeal.

"Your movant further states that he has no money to pay attorney fees or court costs.

"Your movant further states that he is in the custody of the authorities of the Missouri State Penitentiary.

"WHEREFORE, your movant prays this Honorable Court to grant him an order allowing him to appeal as a poor person and for an order directing the official court reporter to prepare the transcript of the evidentiary hearing for appellate review without cost to movant."

(Filed—April 23, 1969.)

DEFENDANT-MOVANT'S MOTION TO APPEAL AS A POOR PERSON AND FOR AN ORDER REQUIRING THE COURT REPORTER TO PREPARE THE TRANSCRIPT OF THE EVIDENTIARY HEARING WITHOUT COST TO MOVANT GRANTED.

Thereafter, and on the 23rd day of April, 1969, the Court entered Memorandum and Order as follows: (Caption and signature omitted)

"Defendant-Movant's motion to appeal as a poor person and for an order requiring the court reporter to prepare the transcript of the evidentiary hearing without cost to movant."

(Filed—April 23, 1969.)

MOVANT'S MOTION FOR A REHEARING

[132] Thereafter, and on the 23rd day of April, 1969, Movant's Motion For a Rehearing was filed, as follows: (Caption and signature omitted)

"Comes now movant, JAMES WILLIAM STIDHAM, and moves the Court to enter its order granting him a new hearing on all issues and as grounds therefor states:

"1. The Court's ruling is contrary to the law and the evidence.

"2. The Court committed prejudicial error in not holding that the procedure used for determining the voluntariness of the confession was unconstitutional.

"3. The Court committed prejudicial error in not holding that the confession admitted into evidence was involuntary.

"4. The Court committed prejudicial error in not holding that the trial court failed to make timely appointment of counsel.

"5. The Court committed prejudicial error in not holding that the trial court failed to properly instruct the jury on the constitutional standards to be used in making their determination as to the voluntariness of the confession.

"6. The Court committed prejudicial error in not holding that the state was allowed to prove and the jury was instructed to consider a crime not included in the [133] indictment.

"7. The Court committed prejudicial error in not holding that the state knowingly and deliberately used perjured testimony."

(Filed—April 23, 1969.)

DEFENDANT-MOVANT'S MOTION FOR A NEW HEARING OVERRULED.

Thereafter, and on the 23rd day of April, 1969, the Court entered Memorandum and Order, as follows: (Caption and signature omitted)

"Defendant-Movant's motion for a new hearing is overruled."

(Filed—April 23, 1969.)

NOTICE OF APPEAL

Thereafter, and on the 23rd day of April, 1969, Notice of Appeal was filed, as follows: (Caption and signature omitted)

"NOTICE is hereby given that the defendant, JAMES WILLIAM STIDHAM, hereby appeals to the Supreme Court of Missouri under Sup. Ct. Rule 27.26 from the judgment overruling his motion under Sup. Ct. Rule 27.26 entered against him in this court in this cause on the 14th day of April, 1969.

"Appealing as a poor person.

"On this 23rd day of April, 1969, I duly filed the [134] within notice in the records of this court and on April 23rd, 1969 served a copy thereof upon the Circuit Attorney and mailed additional copies as follows:

"Hon. Marion C. Spicer, Clerk.

"Hon. John C. Danforth, Atty. General."

(Filed—April 23, 1969.)

TRANSCRIPT ON APPEAL APPROVED

We, the undersigned, approve the above and foregoing Transcript of the record on appeal, and agree that the same may be signed, filed and made a part of the record in said cause.

/s/ Mark M. Hennelly
Attorney for Movant
/s/ Byron L. Kinder
Attorney for Respondent

COST OF PREPARING TRANSCRIPT OF RECORD

Original, 138 pages (including index) @ $.45 per page	$ 62.10
2 carbon copies, 135 pages each (including index) @ $.15 per page	41.40
TOTAL	$103.50

[135] CERTIFICATE OF COURT REPORTER

The undersigned, Melba A. Bassler, hereby certifies that she was the Official Court Reporter of Division No. Twenty of the Circuit Court for Criminal Causes of St. Louis, Missouri, at the time the above cause was tried, and that the cost of preparing the Transcript on Appeal is as set forth above, and that defendant's attorney was furnished copy of this Transcript on Appeal free of charge.

/s/ Melba A. Bassler
Official Court Reporter, CSR,
Div. 20, Circuit Court for
Criminal Causes, St. Louis,
Missouri.

APPENDIX D—Opinion in: State v. Stidham, No. 45537

STATE of Missouri, Respondent

v.

James William STIDHAM, Appellant.

No. 45537

Supreme Court of Missouri,
Division No. 2.
Sept. 9, 1957.

Prosecution resulting in conviction of first degree murder arising out of a prison riot and based on a theory of conspiracy. The Circuit Court of Butler County, Randolph Weber, J., entered judgment of conviction and defendant appealed. The Supreme Court, Bohling, C., held that instruction concerning conspiracy using the words, "aid, abet, assist or encourage" in the disjunctive rather than conjunctively, was proper and did not erroneously authorize a conviction upon a finding that defendant did any one of the four acts.

Judgment affirmed.

1. Criminal Law (Key) 736(2)

In prosecution resulting in a conviction of first degree murder, question concerning the voluntariness of defendant's confession was for jury.

2. Homicide (Key) 308(3), 309(5)

In prosecution resulting in conviction of first degree murder, under defense of alibi the only submissible issue of guilt under evidence was murder in first degree, and therefore the trial court did not err in failing to instruct on murder in the second degree and manslaughter. Section 559.010 RSMo 1949, V.A.M.S.

3. Criminal Law (Key) 437

In prosecution resulting in conviction of first degree murder arising out of prison riot, diagram of floor plan of prison basement, which showed location of cells, steel gates and which was drawn to scale and which was identified by the person making it as well as others was admissible. Section 559.010 RSMo 1949, V.A.M.S.

4. Criminal Law (Key) 404(4)

In prosecution resulting in conviction of first degree murder arising out of a prison riot, 16-pound sledge hammer found at side of victim's body the night of riot was admissible. Section 559.010 RSMo 1949, V.A.M.S.

5. Criminal Law (Key) 1169(5)

In prosecution resulting in conviction of first degree murder arising out of a prison riot, court's instruction to witness not to testify to any statements made by others and conveyed to defendant by the witness cured any alleged error of police officer attempting to explain to defendant that officer had a statement from others.

6. Criminal Law (Key) 432

In prosecution resulting in conviction of first degree murder, trial court properly refused exhibits allegedly relating to fact that a witness was of unsound mind and incompetent since the sources of information and the method and time of preparation of exhibits were not such as to justify exhibits' admission. Sections 490.680, 559.010 RSMo 1949, V.A.M.S.

7. Witnesses (Key) 79(3)

It is court's function, not the function of jury, to pass on competency of a witness. Section 491.060 RSMo 1949, V.A.M.S.

8. Witnesses (Key) 330(3)

Trial courts may exercise a sound discretion as to the extent of the examination of witnesses with respect to specific acts on collateral matters affecting their credibility and not directly connected with the issues on trial.

9. Criminal Law (Key) 1136

Where defendant's counsel did not avail himself of court's offer to recall witness, defendant could not assert error in that he had been unable to cross-examine a witness completely in respect desired.

10. Homicide (Key) 308(1)

In prosecution resulting in conviction of first degree murder, instruction properly required jury to find that the conspirators willfully killed victim.

11. Criminal Law (Key) 755½, 761(11), 811(3)

Where defense to murder prosecution was alibi and there was no contention or evidence that the victim had not been murdered, use of the words "kill and murder" and "killing and murdering" and their repetition several times in an instruction did not constitute comment on evidence or single out and give undue prominence to such words and did not assume a murder had been committed.

12. Homicide (Key) 305

In prosecution resulting in conviction of defendant of murder in the first degree based on theory defendant had conspired with others to kill victim during prison riot, under statute that principals in second degree in the commission of any felony or accessories to any murder or other felony before the fact may be charged, tried, convicted and punished in same manner, as the principal in the first de-

gree, use of words "aid, abet, assist or encourage" in instruction concerning conspiracy disjunctively rather than conjunctively did not erroneously authorize conviction upon the finding that defendant did any one of the four acts. Sections 556.120, 556.170, 559.010 RSMo 1949, V.A.M.S.

13. Criminal Law (Key) 64

With respect to convictions of principals in second degree, in absence of statutory provisions, no particular acts are necessary, nor is it necessary that any physical part in the commission of the crime be taken; mere encouragement is enough.

14. Conspiracy (Key) 41

Persons entering a conspiracy after its formation are deemed in law parties to all acts done by any one of the conspirators, before or after persons' entrance, in furtherance of the conspiracy.

15. Homicide (Key) 234(1)

Evidence justified finding that a conspiracy had been committed and finding of the actual participation in and consummation of the conspiracy to murder by defendant and others named in indictment. Section 559.010 RSMo 1949, V.A.M.S.

16. Criminal Law (Key) 822(1)

An instruction is to be considered as a whole and with other instructions in the case.

17. Conspiracy (Key) 41

Criminal Law (Key) 64, 69

Act of one of conspirators in the furtherance of a conspiracy is the act of the other conspirators and principals

in the second degree and accessories before the fact are equally guilty with the principal in first degree. Section 556.170 RSMo 1949, V.A.M.S.

18. Criminal Law (Key) 763(19), 781(5)

In prosecution resulting in conviction of first degree murder, instruction regarding voluntariness of defendant's confession was proper and statement in instruction to the effect that if jury did not believe that a statement, written or oral and claimed to be a confession made by the defendant, was voluntarily made by him, jury should disregard the statement, was not ambiguous, misleading, incomplete or a comment on evidence. Section 559.010 RSMo 1949, V.A.M.S.

19. Criminal Law (Key) 805(3)

In prosecution resulting in conviction of first degree murder, instruction to effect that if jury believed defendant's statement, written or oral, was voluntarily made, jury must consider such statement did not mislead jury although more appropriately the word "may" could have been used rather than the word "must".

20. Criminal Law (Key) 388

Results of a lie detector examination are inadmissible in evidence.

21. Criminal Law (Key) 900

The statutory right of an accused to no reference to his failure to testify may be waived by him. Section 546.270 RSMo 1949, V.A.M.S.; 42 V.A.M.S. Supreme Court Rules, rules 26.08, 28.02, 28.08.

22. Criminal Law (Key) 721(2)

When an accused takes the stand in his defense, his failure to testify on specific facts involved in the case is a legitimate subject of comment by the state in argument.

23. Criminal Law (Key) 721(2)

Where defendant, accused of murder in first degree, had taken the stand, defendant's failure to deny incriminating facts was open to comment whether the denial should have occurred in an appearance in chief or in an appearance in surrebuttal. Section 546.270 RSMo 1949, V.A.M.S.; 42 V.A.M.S. Supreme Court Rules, rules 26.08, 28.02, 28.08.

Mark H. Hennelly, St. Louis, for appellant.

John M. Dalton, Atty. Gen., Winston Cook, Sp. Asst. Atty. Gen., for respondent.

BOHLING, Commissioner.

James William Stidham appeals from a sentence of life imprisonment for the first degree murder of Walter Lee Donnell during the riot at the Missouri Penitentiary on the evening of September 22, 1954, in Cole County, Missouri. § 559.010. (Statutory references are to RSMo 1949 and V.A.M.S.) The indictment charged defendant, William R. Hoover, Jackie Lee Noble, Paul Edward Kenton, Rollie Laster, Don Wm. DeLapp and Joseph M. Vidauri with the commission of the offense. All were inmates of the penitentiary. Defendant's case, upon his application for change of venue, was tried in the Circuit Court of Butler County, Missouri, in July, 1955. Defendant was well represented by counsel. He has filed no brief. His motion for new trial presents many issues.

The defense was an alibi; but certain issues call for some detail of the facts.

[1] I. There is no merit in defendant's contention that his written confession was coerced and involuntary and was admitted in evidence before the State established that it had been voluntarily given. The court conducted a full preliminary hearing on the issue, found the issue was for the jury, and later, after hearing the evidence before the jury, submitted the issue to the jury for determination. The testimony was to like effect at each hearing. Two members of the State Highway Patrol and four members of the St. Louis Metropolitan Police force, present at the time defendant claimed physical violence occurred, testified that no promises had been given, or physical violence, duress, threats or abuse was offered to defendant, categorically denying defendant's testimony. On the conflicting showing the issue of the voluntariness of the confession was for the jury. State v. Gibilterra, 342 Mo. 577, 116 S.W. 2d 88, 93 [3, 4]; State v. Laster, Mo., 293 S.W.2d 300, 303 [1, 2]; State v. Sanford, 354 Mo. 998, 1006 [4], 193 S.W.2d 31, 37, 38 [2]; State v. Menz, 341 Mo. 74, 106 S.W.2d 440, 448 [12].

Defendant stated, among other things, in his confession, written in his own hand, that several prisoners broke into death row and Paul Kenton unlocked his cell door. He and several other prisoners then went to Creighton's cell to attack him but he had his lock blocked and they could not enter. They then entered Donnell's cell, and, quoting: "Kenton held Donnell while Laster stabbed him several times with an ice pick, at the same time I slashed at him three or four times around the face and neck with a knife that Kenton gave me when he opened the door. When Donnell fell to the floor Linder and Thompson each said get Donnell with the sledge and they proceeded to

hit him with a sledge hammer and a crowbar." Defendant also orally stated that he did not like Donnell because Donnell had snitched in regard to a riot in July and caused defendant to be punished; that Donnell had snitched on some of the boys and they had received a lot of time; and that he was living his life under a different code than the officers.

The jury could find, aside from defendant's confession, the following outlined facts from the evidence.

The homicide occurred in what is known as "death row." Death row, consisting of thirty-two cells, was located in the basement of "B" Hall. Three heavy steel gates or doors separated death row proper from other parts of the building. B Hall proper, above death row, housed a cell block.

The riot started about 6:30 p. m. September 22, 1954. Nine inmates, for various reasons were confined in death row that evening. Defendant, who was known as "Slick," and his co-indictee Laster occupied adjoining cells, having been transferred to death row about July, 1954. Donnell, the deceased, and James M. Creighton also occupied adjoining cells in death row, some distance from defendant and Laster.

From the date defendant was placed in death row he would "holler down" and curse and ridicule Donnell, threatened to kill Donnell if he ever got to him, said that "when they come in here and get us out, we are going down there and kill" Donnell and Creighton; and that they should have killed Donnell over in E Hall when they broke out over there.

Clarence Dietzel was on guard duty in death row the night of the riot. He noticed the disturbance and started closing the windows to death row. Defendant and Laster

demanded that the windows opposite their cells be left open.

About 7:00 or 7:30 p. m. some of the rioters tried to break into B Basement. While the prisoners were trying to break into death row, defendant and Laster "hollered" that they would be down to kill Donnell and Creighton as soon as they got out of their cells. Defendant said he was going to kill Donnell because Donnell took the stand against one Thompson and some others.

DeLapp, known as Curley, Kenton, Noble, Hoover, and Vidauri, were among the number trying to break in. They worked on the first door with a sledge hammer, crowbars, pick and other small tools. DeLapp called to defendant, saying: "Slick, this is Curley DeLapp. We will be in to get you out if it takes, costs us hell and high water." "We are coming down to get you out. We are going to get you out." Defendant answered: "Hurry up, Goddamn it, I am waiting for you." DeLapp sent Hoover and Kenton out to burn the buildings. They returned. Vidauri guarded a paint bucket containing knives, having 5 or 6 inch blades, used in the twine plant. After working on the door for a while, DeLapp called to defendant that they could not make it and were going to try something else. Defendant told DeLapp to come around to the south windows and said he might make it there. DeLapp, Noble, Hoover and Kenton went out and tried to make an entrance through the wall into death row with the sledge hammer. Defendant and Laster talked to DeLapp through the open windows and had him go back and work on the door. They again started to work on the door and DeLapp called to defendant saying: "We are going to try again." Then, in a short time someone produced a key and the men came into B Basement proper. DeLapp and also Kenton demanded Dietzel's keys, threatening to kill him if he refused to hand

them over. Dietzel insisted he did not have the keys and did not give the keys to them. DeLapp with the help of others, then broke the lock on the second door with a sledge hammer. DeLapp, Noble, Kenton and Hoover immediately entered to where guard Dietzel was. They placed Dietzel on a small table and searched him for the keys, Kenton pulling the lining completely out of his coat. DeLapp ordered Dietzel to call the warden's office and immediately took the telephone from him. About this time the door to death row proper opened. Noble and Kenton placed Dietzel in one of the death row cells, where he remained for about twenty minutes, and was then taken up the steps and placed in the mop room in B Hall.

DeLapp, Noble, Kenton, Hoover, Vidauri and one Miller finally released defendant and Laster, as well as other prisoners who desired to be released from their cells in death row. DeLapp led them up the aisle and said to the onlookers: "Get back men, they are coming out now"; and when they came out and stopped, DeLapp put his arm around defendant's shoulders and said: "Gentlemen, I have brought you this far, this is your leader from here on." Defendant answered: "Well men, I am ready to work." They then went into the room where Vidauri was guarding the knives and returned to death row armed with weapons. Defendant told Vidauri to go ahead but Vidauri answered, "No, I am going with you. I am all the way with you guys." They then went back into death row. DeLapp had the other inmates go upstairs in B Hall.

Defendant, Laster, Hoover, DeLapp, Kenton, Noble and Vidauri tried to break into Creighton's cell. They had a sledge hammer, a pole and other weapons. Creighton had jammed his lock with concrete and a comb. Defendant said he was going to settle the score with Donnell and

Creighton. They broke Creighton's jaw in two places, using a pole. He got the pole away from them, and started using it on them. Defendant told Donnell they would be over to get him next. They could not get Creighton's cell door open and started working on Donnell's door. Creighton heard Donnell's door go back and saw the seven men walk up to go into Donnell's cell. He could not see through the cell walls. He heard Donnell hollering: "I ain't no rat, I ain't no snitch. And I ain't never harmed you boys," and he was begging them. Pretty soon Donnell was going Oh, oh, and he hollered real loud and got to kind of gurgling. The men then ran out of Donnell's cell and up the aisle. They went to a wash basin and each washed his hands. Defendant and Noble took off their undershirts and discarded them.

Donnell received a multiplicity of wounds. He had five stab wounds in the front and four stab wounds in the back on the left side in the region of the heart and lungs. Two of the front wounds passed completely through his heart and two of the back wounds penetrated his heart. His skull had sustained an egg shell type fracture, three or four inches in area, a multiple crushing type fracture of many small fragments, which could have been made by a bloody, 16-pound sledge hammer found alongside his body about 10:30 p. m. that day by an officer. He had other wounds on his body.

[2] II. Defendant contends error resulted from the court's failure to instruct on murder in the second degree and manslaughter. The defense was an alibi. The only submissible issue of guilt under the evidence was murder in the first degree. State v. Taylor, 347 Mo. 607, 148 S.W. 2d 802, 805 [5]; State v. Clymer, Mo., 159 S.W.2d 808, 812 [9]; State v. Barbata, 336 Mo. 362, 80 S.W.2d 865, 868 [1, 2]. See State v. Laster, Mo., 293 S.W.2d 300, 302, and §

559.010. It also follows that error was not committed in overruling defendant's motions for judgment of acquittal and judgment of acquittal as to murder in the first degree.

[3,4] III. Defendant's contentions that State's Exhibits No. 1 and No. 9 should not have been received in evidence because hearsay, not properly identified and because such action violated his constitutional rights are without merit. The testimony established that Exhibit 1 was a diagram of the floor plan of B Basement, showed the location of the cells, steel gates, et cetera, was drawn to scale, and it was identified by the person making it and others. State's Exhibit 1 was admissible. State v. McGee, 336 Mo. 1082, 83 S.W.2d 98, 107 [26]; State v. McHarness, Mo., 255 S.W.2d 826, 829 [6]. Exhibit 9 was a bloody 16-pound sledge hammer found at the side of Donnell's body by W. S. Barton of the State Highway Patrol about 10:30 p. m. the night of the riot. It was also identified by a number of other witnesses. Defendant's confession refers to the use of a sledge hammer in the killing of Donnell. There was no error in the admission of Exhibit 9. State v. Hopkins, 278 Mo. 388, 213 S.W. 126, 128 [5]; State v. Wilson, 223 Mo. 173, 189, 122 S.W. 671, 676 [5].

[5] IV. During the examination of Officer Eitzman of St. Louis, who was present at the time defendant gave his written confession, the officer stated he talked to defendant "and explained to him that I had a statement * * *." Defendant's objection to the remark was sustained and the witness was instructed not to testify to any statements made by other prisoners and conveyed to defendant by the witness. Notwithstanding the court's ruling, defendant's motion for new trial asserts the court could not cure the alleged error. A more questionable situation arose under similar circumstances in State v. Vidauri, Mo., 293 S.W.2d 955, 956 [2,3], and was ruled against defend-

ant's contention. See State v. Montgomery, Mo., 223 S.W. 2d 463, 466 [11,12]. The point is ruled against defendant.

[6,7] V. Defendant claims error in the exclusion of his Exhibits B, C, C-1, and D. Exhibit B was never offered in evidence.

Defendant objected to James M. Creighton being sworn as a witness on the ground he was of unsound mind and incompetent. The jury was excused and a voir dire hearing was conducted at which Mrs. Alma Miller, the Medical Records Clerk of State Hospital No. 1, at Fulton, and Creighton were examined. Mrs. Miller produced a file of a number of pages marked defendant's Exhibit B for identification, and out of the file defendant offered and the court accepted in evidence at the voir dire examination two typewritten sheets marked defendant's Exhibits C and C-1; and another typewritten sheet marked defendant's Exhibit D.

Creighton testified on voir dire that he had been in "solitary" for about eighteen months and "played crazy," put on a good act to get out of solitary and be sent to the State Hospital and after thirty-five days was returned to the Penitentiary; that he had never been before a Probate Court and committed as an insane person; and that he had been in a mental institution only that one time. The court found that Creighton was a competent witness.

Later, upon Creighton's cross-examination before the jury defendant developed that Creighton had put on a pretty good act and had been transferred to the State Hospital at Fulton, where he remained five or six weeks before being retransferred to the Penitentiary, and placed in death row in May, 1954. Upon an objection being interposed to a question, counsel for defendant, out of the presence of the jury, stated he was asking the court to

make Creighton's competency as a witness a jury question. The court informed counsel the jury passed on the credibility of witnesses but not their competency and counsel was entitled to examine the witness on any matters affecting his credibility. Counsel stated he would not pursue the matter further. His subsequent offer of said Exhibits C, C-1, and D in evidence before the jury was refused.

Mrs. Miller testified that Exhibits C and C-1 were attached to a Missouri Penitentiary letterhead; that she did not know who made the record or when it was made, and could not say it was a record of State Hospital No. 1; and with respect to Exhibit D she was not willing to swear it was correct because it was not signed. The showing was such as to permit of a finding that the sources of information, and method and time of preparation of the exhibits were not such as to justify their admission before the jury. § 490.680; Gray v. St. Louis-San Francisco R. Co., 363 Mo. 864, 254 S.W.2d 577, 579 [1]. In addition, it was the court's function, and not the function of the jury, to pass on the competency of the witness. § 491.060; State v. Whitsett, 232 Mo. 511, 526(IV), 134 S.W. 555, 560(4); Kleinschmidt v. Bell, 353 Mo. 516, 183 S.W.2d 87, 91 [4,5]; State v. Herring, 268 Mo. 514, 188 S.W. 169, 172 [3, 5-8]; 97 C.J.S. Witnesses § 119 f, p. 541; 2 Wigmore on Evidence 523, §§ 487, 497(c).

[8,9] VI. The court sustained an objection to defendant's offer of proof at the close of the cross-examination of witness Creighton that he had access to one Mary Annis, they both being confined in the Cole County jail at the time of trial. Thereafter and prior to the calling of the next witness the court made it clear to defendant's counsel that he was at liberty to show the interest of the witness in testifying in the case and to develop any arrangement made covering any special privileges in connection with

his testimony, and offered to recall the witness for further cross-examination. Defendant's motion for new trial states the court erred in not permitting him to cross-examine the witness completely with respect to his association with Mary Annis. Trial courts may exercise a sound discretion as to the extent of the examination of witnesses with respect to specific acts on collateral matters affecting their credibility and not directly connected with the issues on trial. Adriance v. Arnot, 31 Mo. 471; State v. Nasello, 325 Mo. 442, 30 S.W.2d 132, 139 [26]; State v. Brotherton, Mo., 266 S.W.2d 712, 714 [2]. Counsel did not avail himself of the court's offer to recall the witness and may not now successfully urge reversible error.

VII. Defendant makes many attacks on the State's main instruction, Instruction No. 4, which, after defining "felonious," and other terms, reads, in so far as questioned:

"Bearing in mind these definitions and those included in the other instructions, the court instructs the jury that if you believe and find from the evidence, beyond a reasonable doubt, that Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph M. Vidauri entered into a conspiracy and agreement to act in concert and together to kill and murder Walter Lee Donnell at the time and place and in the manner and by the means hereafter set forth in this instruction, and if you believe and find from the evidence, beyond a reasonable doubt, that pursuant to such a conspiracy and agreement those aforesaid persons, acting in concert and together, on September 22, 1954, in Cole County, Missouri, wilfully, deliberately, premeditatedly, and with malice aforethought did make an assault upon Walter Lee Donnell, and then and there did wilfully, deliberately, premeditatedly, and with malice aforethought forcibly strike, hit,

stab, cut, and beat Walter Lee Donnell in and upon his face, head, and body, with a sledge hammer, and a knife, and another sharp instrument or dagger, if you so find, thereby giving Walter Lee Donnell about his face, head, and body, mortal wounds from the effects of which he died on September 22, 1954, if you so find, and if you further believe and find from the evidence, and beyond a reasonable doubt, that the defendant, James William Stidham, at the time of such killing and murdering, was a member of the conspiracy and agreement aforesaid and theretofore had conspired and agreed with Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph M. Vidauri, to aid, abet, assist or encourage them in the killing and murdering of Walter Lee Donnell at the time and place and in the manner and by the means aforesaid, and if you further believe and find from the evidence, beyond a reasonable doubt, that the defendant, James William Stidham, pursuant to such conspiracy and agreement, was actually present during the killing and murdering aforesaid of Walter Lee Donnell, and that he knew of the felonious purpose and intent of Rollie Laster, William R. Hoover, Paul Edward Kenton, Jackie Lee Noble, Don William DeLapp, and Joseph Vidauri to kill and murder Walter Lee Donnell as aforesaid, and that James William Stidham then and there knowingly and intentionally aided, abetted, assisted, or encouraged the aforesaid persons, or any of them, in the aforesaid killing and murdering, then you should find the defendant, James William Stidham, guilty of Murder in the First Degree and by your verdict so say. * * *"

[10] a. The required finding of the instruction that pursuant to a conspiracy the conspirators acting in concert "then and there did wilfully, deliberately, premeditatedly, and with malice aforethought forcibly strike, hit, stab, cut,

and beat Walter Lee Donnell in and upon his face, head, and body, with a sledge hammer, and a knife, and another sharp instrument or dagger, if you so find, thereby giving Walter Lee Donnell about his face, head and body, mortal wounds from the effects of which he died on September 22, 1954, if you so find," refutes defendant's assertion that the instruction did not require the jury to find that the conspirators wilfully, et cetera, killed Donnell.

[11] b. The use of the words "kill and murder" and "killing and murdering" and their repetition several times in the instruction did not, as stated by defendant, constitute a comment on the evidence, or single out and give undue prominence to such words, under the facts adduced in evidence by the State and did not assume a murder had been committed. The instruction required the finding of the submitted facts beyond a reasonable doubt. The defense was an alibi; and there was no contention or evidence that Donnell had not been murdered.

[12, 13] c. Defendant questions the use of the words "aid, abet, assist or encourage" and "aided, abetted, assisted, or encouraged" in the instruction, contending the use of the terms disjunctively rather than conjunctively erroneously authorized a conviction upon a finding that defendant did any one of the four acts. Under § 556.170 principals in the second degree in the commission of any felony or accessories to any murder or other felony before the fact "may be charged, tried, convicted and punished in the same manner, as the principal in the first degree." Consult also § 556.120 on the offense of conspiracy. Blackstone's Commentaries, Vol. 4, Ch. III, p. *34, defines a principal in the first degree as "the actor or absolute perpetrator of the crime; and in the second degree he is who is present, aiding and abetting the fact to be done"; and an accessory before the fact "to be one

who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime." See authorities there cited; also 22 C.J.S. Criminal Law §§ 85-93, p. 152; 14 Am.Jur. 820, B, 832, C. It is stated in 22 C.J.S. Criminal Law § 88, p. 159, with respect to principals in the second degree, in the absence of statutory provisions that "no particular acts are necessary; nor is it necessary that any physical part in the commission of the crime be taken; mere encouragement is enough." And see Id., § 93, p. 164, with respect to an accessory before the fact. McMannus v. Lee, 43 Mo. 206, 208, states: "The law is well laid down that any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as a principal * * *." Approved in State v. Walker, 98 Mo. 95, 104, 110(11), 9 S.W. 646, 650, 652(11), 11 S.W. 1133, and other cases. See also State v. Messino, 325 Mo. 743, 766(V), 30 S.W.2d 750, 760(V); State v. Lawrence, Mo., 280 S.W.2d 842, 848; State v. Ruffin, Mo., 286 S.W.2d 743, 748 [10, 11]; State v. Murray, Mo., 193 S.W. 830, 832; State v. Clymer, Mo., 159 S.W.2d 808, 811 [8]; People v. Chapman, 62 Mich. 280, 284, 28 N.W. 896, 897. The submission was not erroneous.

[14, 15] d. We have hereinbefore stated enough, but not all, of the evidence favorable to the State. Generally, a conspiracy is not shown by direct evidence. It is often inferred from the circumstances. State v. Parr, 296 Mo. 406, 246 S.W. 903, 906 [8]. In the instant case there was ample evidence for a finding of the conspiracy submitted and the actual participation in and consummation of the said conspiracy by the persons named in the instruction. Persons entering a conspiracy after its formation are

deemed in law parties to all acts done by any one of the conspirators, before or after his entrance, in furtherance of the conspiracy. State v. Walker, 98 Mo. 95, 105, 106, 9 S.W. 646, 650; State v. Crab, 121 Mo. 554, 563, 26 S.W. 548, 550; State v. Richetti, 342 Mo. 1015, 119 S.W.2d 330, 342 [14, 15]; 15 C.J.S. Conspiracy § 75, p. 1107; 11 Am.Jur. 571, § 40.

[16] An instruction is to be considered as a whole and with the other instructions in the case. Instruction No. 4 is to be read with No. 5, set out infra. The Missouri cases cited to Point VII, c. sustain Instruction No. 4. It was more favorable to defendant than the law required it to be. We need not detail the other attacks against it.

VIII. Defendant's motion questions Instruction No. 5, which reads:

"The Court instructs the jury that, if you believe and find from the evidence, beyond a reasonable doubt, that the defendant, James William Stidham, and William R. Hoover, Rollie Laster, Paul Edward Kenton, Jackie Lee Noble, Don William De Lapp and Joseph M. Vidauri entered into a conspiracy and agreement to act in concert and together to kill and murder Walter Lee Donnell at the time and place and in the manner and by the means set forth in Instruction No. 4, then the act of either of them pursuant to such conspiracy and agreement to kill and murder Walter Lee Donnell would be in law the act of each one so conspiring and agreeing.

"The word 'Conspiracy,' as used in these instructions, means a common agreement and understanding between two or more persons which is formed for the purpose of committing and doing by their joint efforts some criminal act.

"The Court instructs the jury that all persons are principals who are guilty of acting in concert and together in the commission of a crime. When a crime is actually committed by one or more persons and another person is actually present, and, knowing of the felonious purpose and intent of the person or persons committing the crime, he knowingly and intentionally aids, abets, assists or encourages the person or persons actually committing the crime in the commission of the same, then such person so knowingly and intentionally aiding, abetting, assisting or encouraging the person or persons actually committing the crime in the commission of the same is a principal and he is equally guilty with the person or persons who actually commits the crime.

"However, you are further instructed that the mere presence of a person at the time and place of the commission of a crime by another or others is not alone sufficient to justify him in any manner responsible for the commission of such crime. On the contrary, before such person can be found in any manner responsible for the commission of such crime, the evidence in the case must show, beyond a reasonable doubt, not only that such person was actually present at the commission of such crime, but also that such person knew of the felonious purpose and intent on the part of the person or persons actually committing the crime, and that he then and there was knowingly and intentionally aiding, abetting, assisting or encouraging the person or persons committing the crime in the commission of the same."

[17] This instruction is to be considered with the other instructions in the case. The submitted facts of the first paragraph of Instruction No. 5 were required to be found beyond a reasonable doubt. The other paragraphs of the instruction are merely definitive, legal statements of

what constitutes a conspirator and a conspiracy, assume nothing, and are not subject to successful attack on the ground they are abstract. We have hereinbefore held there was substantial evidence of the submitted conspiracy embracing all the named participants. The conspiracy was incidental to the offense charged. It is also the law that the act of one of the conspirators in the furtherance of the conspiracy is the act of the other conspirators, and § 556.170 makes principals in the second degree and accessories before the fact equally guilty with the principal in the first degree. (See instructions in State v. Cantlin, 118 Mo. 100, 107, 111(II), 23 S.W. 1091, 1093, 1095(2), considered to fairly cover the issue.) What we have hereinbefore said sufficiently answers defendant's attacks against Instruction No. 5. Instructions less favorable to a defendant have been approved. State v. Walker, supra; State v. Messino, supra; State v. Murray, supra; State v. Lawrence, supra; State v. Clymer, supra; State v. Nasello, 325 Mo. 442, 459(IV), 30 S.W.2d 132, 137(IV) (instruction 2 therein being to the same effect as instruction 2 set out in State v. Messino, supra); State v. Williams, 309 Mo. 155, 274 S.W. 427, 434(VII); State v. Dowling, 360 Mo. 746, 230 S.W.2d 691, 694 [6]; State v. Mayberry, Mo., 272 S.W.2d 236, 243 [20].

[18] IX. Defendant also questions Instruction No. 6, which reads:

"The Court instructs the jury that before any alleged statement can be valid, and before you can even consider it, it must have been made voluntarily, that is to say, without anyone having offered to the person who is claimed to have made such a statement any hope of leniency or reward of any kind for making such statement, and without anyone making any threat or doing any violence to the person claimed to have made any such statement in order to induce or force him to confess.

"If the jury does not believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury should entirely disregard such statement in arriving at your verdict.

"If, however, the jury does believe that a statement, written or oral, and claimed to be a confession made by the defendant, was voluntarily made by him as defined above, the jury must consider such statement and you should give it such weight as you believe it deserves in arriving at your verdict."

We do not agree with the contention in defendant's motion that the clause "claimed to be a confession made by the defendant" is ambiguous, misleading, incomplete and a comment on the evidence. The State's evidence was that the statements were voluntary and defendant's evidence was to the contrary. No intelligent jury would be confused. It was proper to instruct on the voluntariness of defendant's statement. State v. Cunningkin, Mo., 261 S.W.2d 85, 87.

[19] Defendant contends in his motion the use of the word "must" in the third paragraph of Instruction No. 6 gives judicial direction to the jury, invades the province of the jury and is a comment on the evidence. The instruction is a cautionary instruction on a collateral issue, does not direct a verdict, and is not on an issue the court is required to instruct upon as part of the law of the case under Sup.Ct. Rule 26.02, 42 V.A.M.S. § 546.070(4); State v. Cunningkin, Mo., supra; State v. Gibilterra, 342 Mo. 577, 116 S.W.2d 88, 94, 95; State v. Francies, Mo., 295 S.W.2d 8, 15 [24, 25]. Trial juries "shall be sworn well and truly to try the case." Sup.Ct.R. 26.02. See §§ 546.070, 546.220; State v. Duff, 253 Mo. 415, 424(IV), 161 S.W. 683, 685(IV). The oath administered to trial jurors embraces the obligation to try the case according to the evidence. Consult 50

C.J.S. Juries § 296, p. 1088; 2 Hale, Pleas of the Crown, 293. The instruction made it plain that before the jury could "even consider" defendant's statement, the jury should find "it must have been made voluntarily," and if the jury did not so find, the jury "should entirely disregard" it in reaching the verdict. An instruction substantially identical to the instant instruction was given in State v. Laster, Mo., 293 S.W.2d 300, 304, a companion case, and we stated, no issue being presented, "an adequate instruction was given on this subject." In State v. Stibbens, 188 Mo. 387, 396(III), 87 S.W. 460, 462(3), an instruction told the jury "you should take such confession into consideration" if voluntarily made. See State v. Pillow, Mo., 169 S.W.2d 414, 416; State v. Hostetter, Mo., 222 S.W. 750, 753(II); State v. Hartman, Mo., 272 S.W.2d 276 [1, 2]. We are not approving the use of the word "must" in the instruction. A more appropriate word would be "may." However, the jury, if it found defendant voluntarily made the statement, would, unless it violated its oath, consider the statement. The questioned clause was modified by the succeeding clause; and under the instruction, if the statement was made voluntarily, the jury was not told how to consider the statement and was free to give the statement no weight whatever in arriving at the verdict. It stated the duty the law placed upon the jury. We conclude on the record before us that the jury was not misled and reversible error did not occur. Consult State v. Harris, 357 Mo. 1119, 212 S.W.2d 426, 428 [7, 8].

[20] X. Defendant complains of the court's overruling of his motion for a polygraph examination of himself, which he offered to pay for. We see no necessity for requesting a court to rule on a motion of this nature. The authorities are to the effect that the results of lie detector examinations are inadmissible in evidence. 23 C.J.S. Criminal Law § 967, p. 295; 20 Am. Jur. 633, § 762; Henderson v. State of Oklahoma, 94 Okl.Cr. 45, 230 P.2d

495, 23 A.L.R.2d 1292, 1306 (annotation). See State v. Cole, 345 Mo. 181, 188 S.W.2d 43, 51 [12]; State v. Hudson, Mo., 289 S.W. 920 [2].

[21-23] XI. Defendant contends in his motion that the court erred in not sustaining his objection to the prosecuting attorney's statement in argument that defendant failed to go back on the stand and rebut certain testimony adduced by the State in rebuttal to testimony given by defendant while on the stand. The statutory right of an accused to no reference to his failure to testify (Sup.Ct.R. 6.08; § 546.270) may be waived by him. State v. Tiedt, 360 Mo. 594, 229 S.W.2d 582, 587 [8]. It is made clear in State v. Larkin, 250 Mo. 218, 234 (III), 157 S.W. 600, 604 [4], 46 L.R.A., N.S., 13, that when an accused takes the stand in his defense, as in the instant case, his failure to testify on specific facts involved in the case is a legitimate subject for comment by the state in argument. State v. Pierson, 343 Mo. 841, 123 S.W.2d 149, 157 [14]: State v. Smith, Mo., 252 S.W. 662, 667 [14]. Having taken the stand, defendant's failure to deny incriminating facts was open to comment whether the denial should have occurred on an appearance in chief or an appearance in surrebuttal.

The transcript discloses that all matters for consideration here upon the record (Sup.Ct.R. 28.02, 28.08) are in proper form and sufficient.

The judgment is affirmed.

BARRETT and STOCKARD, CC., concur.

PER CURIAM.

The foregoing opinion by BOHLING, C., is adopted as the opinion of the court.

EAGER, P. J., and STORCKMAN, J., and BROADDUS, S. J., concur.

LEEDY, J., not sitting.

APPENDIX E—Opinion in: State v. Stidham, No. 52406

STATE of Missouri, Respondent,

v.

James William STIDHAM, Appellant.

No. 52406.

Supreme Court of Missouri,
En Banc.
June 5, 1967.

Appeal from judgment of the Circuit Court, Butler County, Howard R. Maness, J., denying prisoner's second motion to vacate judgment of conviction. The Supreme Court, Storckman, C. J., held that in view of fact that prisoner would, regardless of judgment on appeal, be immediately entitled to proceed under provisions of not yet effective amended rule requiring motions to vacate to be in questionnaire form and providing for appointment of counsel if motion presents questions of law or issues of fact and movant is shown to be indigent, prisoner would be granted maximum relief to which he was entitled so that further proceedings could be held in compliance with provisions of amended rule.

Order and judgment reversed and cause remanded with directions.

1. Criminal Law (Key) 998(1)

Although effective date of newly revised rule requiring motion to vacate judgment to be in questionnaire form and providing for appointment of counsel if motion presents questions of law or issues of fact and movant is shown to be indigent is September 1, 1967, trial courts may use the new procedure before that date. V.A.M.R. S.Ct. Rule 27.26.

2. Criminal Law (Key) 998(21)

Amended rule requiring motions to vacate judgment to be in questionnaire form and providing for appointment of counsel if the motion presents questions of law or issues of fact and movant is shown to be indigent is intended to discover and adjudicate all claims for relief in one application and avoid successive motions. V.A.M.R. S.Ct. Rule 27.26.

3. Criminal Law (Key) 1189

In view of fact that regardless of whether denial of prisoner's second motion to vacate judgment of conviction was affirmed or reversed, he would be immediately entitled to proceed under not yet effective amended rule requiring motions to vacate to be in questionnaire form and providing for appointment of counsel if motion presents questions of law or issues of fact and movant is shown to be indigent, prisoner was granted maximum relief to which he was entitled so that order and judgment denying motion were reversed and cause was remanded with directions that all further proceedings be in compliance with amended rule. V.A.M.R. S.Ct. Rule 27.26 (c, e, h, i).

Norman H. Anderson, Atty. Gen., Walter W. Nowotny, Jr., Asst. Atty. Gen., Jefferson City, for respondent.

James William Stidham, pro se.

STORCKMAN, Chief Justice.

The appellant James William Stidham is a prisoner in the Missouri State Penitentiary where he is serving a sentence of life imprisonment for murder. The judgment of conviction was affirmed by this court on September 9, 1957. State v. Stidham, Mo., 305 S.W.2d 7. On March 9, 1964, Stidham, pursuant to S.Ct. Rule 27.26, V.A.M.R. filed pro se in the Circuit Court of Butler County a motion to

vacate and set aside his sentence. The motion to vacate was denied without an evidentiary hearing and on appeal this court on June 13, 1966, affirmed the order and judgment. State v. Stidham, Mo., 403 S.W.2d 616. Thereafter, Stidham filed pro se a second motion to vacate under Rule 27.26 which presented claims not made in his first motion. The trial court without an evidentiary hearing also denied the second motion to vacate and the prisoner's appeal from that order and judgment is now before us. The movant filed a brief pro se in this court and made an oral argument.

[1] On January 9, 1967, this court adopted a revised S.Ct. Rule 27.26. The effective date of the revised rule is September 1, 1967, but the trial courts may use the new procedure before that date. State v. Garner, Mo., 412 S.W.2d 155, 157.

[2] The amended rule was adopted after considerable study and is intended to provide a post-conviction procedure in accord with the principles enunciated in the so-called trilogy of Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148, Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837, and Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770. Further in keeping with the teachings of the trilogy, the amended rule is designed to discover and adjudicate all claims for relief in one application and avoid successive motions by requiring motions to be in questionnaire form and by providing for the appointment of counsel if the motion presents questions of law or issues of fact and the movant is shown to be indigent.

[3] These and other provisions intended to furnish more adequate post-conviction relief were not provided by Rule 27.26 in effect at the time the present motion was filed or when the appeal was argued and submitted in this court. It is apparent, however, that regardless of whether

this court affirms the order and judgment, or reverses and remands the cause, the movant will be immediately entitled to proceed under the provisions of amended Rule 27.26 and compliance with the amended rule would be obligatory after September 1 this year. In these circumstances, it would be improvident to process the appeal further and undertake to prepare an opinion on the merits. The maximum relief to which the appellant is entitled in this court is a reversal of the order and judgment of the trial court and a remand for further proceedings under amended Rule 27.26. Bosler v. Swenson, 8 Cir., 363 F.2d 154; Swenson v. Bosler, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33. Furthermore, it appears that appellant's motion raises one or more issues of fact on which appellant would be entitled to an evidentiary hearing.

Accordingly, the order and judgment is reversed and the cause is remanded with directions that all further proceedings be in compliance with the provisions of amended Rule 27.26. If appellant elects to proceed with his motion in the trial court, counsel must be appointed under subparagraph (h) of the amended rule since appellant has been shown to be an indigent person. Counsel should file an amended motion which includes every ground known to the prisoner for vacating, setting aside or correcting his conviction and sentence and the prisoner shall verify the correctness of the motion, including the fact that he has recited all claims known to him, all as required by subparagraph (c) of the amended rule. The trial court then is required to conduct a full evidentiary hearing on the amended motion as required by subparagraph (e) of the amended rule, assuming that the motion raises questions of fact as does the present motion, after which the court then is to decide all issues of fact and questions of law, making findings of fact and conclusions of law as required by subparagraph (i) of amended S.Ct. Rule 27.26.

All of the Judges concur.

APPENDIX F—Opinion in: State v. Stidham, Reinstated Appeal, Nos. 45537 and 54674

STATE of Missouri, Respondent,

v.

James W. STIDHAM, Appellant.

Nos. 45537, 54674.

Supreme Court of Missouri,
Division No. 2.
Feb. 9, 1970.

The Supreme Court set aside its affirmance of prior postconviction judgment and remanded cause for amendment of motion to vacate in view of revised postconviction procedure. The Circuit Court of the City of St. Louis, Michael F. Godfrey, J., and the Circuit Court of Butler County, Randy Weber, J., entered judgment from which petitioner appealed. The Supreme Court, Barrett, C., held that even though indictment did not charge conspiracy, instruction hypothesizing that defendants conspired, acted in concert, and aided and abetted in killing did not violate due process on theory that it violated constitutional proscription against jury's consideration of crime not included in indictment where evidence supported hypothesis, indictments charged defendants with killing victim by assault with deadly weapons with malice aforethought and conspiracy was inherent and may have been incidentally included offense.

Affirmed.

1. Constitutional Law (Key) 268(2)

Even though indictment did not charge conspiracy, instruction hypothesizing that defendants conspired, acted in concert, and aided and abetted in killing did not violate due process on theory that it violated constitutional pro-

scription against jury's consideration of crime not included in indictment where evidence supported hypothesis, indictments charged defendants with killing victim by assault with deadly weapons with malice aforethought and conspiracy was inherent and may have been incidentally included offense. V.A.M.S. Const. art. 1, § 18(a); Sections 544.250, 556.120, 556.130, 556.170 RSMo 1959, V.A.M.S.

2. Constitutional Law (Key) 268(2)

Instruction defining conspiracy and stating that all persons who are guilty of acting in concert and together in commission of crime are principals did not infringe on due process by allowing state to prove and jury to be instructed to consider crime not included in indictment where instruction was warranted by statute and there was evidence of conspiracy, actual participation in and consummation, in conspiracy by defendants even though indictment did not charge conspiracy. V.A.M.S. Const. art. 1, § 18(a); Sections 544.250, 556.120, 556.130, 556.170 RSMo 1959, V.A.M.S.

3. Constitutional Law (Key) 268(8)

Record containing corroboration for testimony of two witnesses, alleged to have given perjured testimony, failed to establish violation of due process by state's knowing use of perjured testimony based on fact that such witnesses who had been inmates, had had their sentences commuted and had been released from prison. V.A.M.R. Crim. Rule 27.26.

4. Constitutional Law (Key) 268.1(3)

Where defendant was not prosecuted by information, but by indictment, eliminating need for preliminary hearing, failure of court to appoint counsel at preliminary hearing, even though defendant requested counsel at such hearings, did not deny defendant due process of law. Section 544.250 RSMo 1959, V.A.M.S.

5. Criminal Law (Key) 998(17)

Record, including many pretrial motions by defendant's counsel, failed to support defendant's allegation of lack of counsel prior to trial.

6. Criminal Law (Key) 531(3)

Record failed to support claim that defendant's confession was extracted through physical force and threats of physical force by being beaten with cork ball bat and by not being given any food or water for three days.

7. Constitutional Law (Key) 266

Where, after trial judge overruled motion to suppress confession, all witnesses testified to same facts and circumstances as they had on motion to suppress as it related to issue of voluntariness, and upon this testimony issue of voluntariness was submitted to jury, court's procedure for determining voluntariness did not fail to comport with minimum standards of due process.

8. Criminal Law (Key) 1172(2)

Instructions on voluntary confession were not prejudicially erroneous where there was, at time of trial, only claim that oral and written confessions were obtained by physical force and violence, and no claim of mental coercion and where claim of mental coercion was not raised until 13 years later on motion to vacate sentence. V.A.M.R. Crim. Rule 27.26.

9. Criminal Law (Key) 998(6)

Where, at time defendant gave his statements, circumstances surrounding victim's death and defendant's part in it were known, and defendant's statements played but little if any part in his conviction in view of other testimony,

claim that statement was not voluntary, on ground that three errors, one in age, one in place of residence and prior record, conclusively established that statement was not voluntary, was not ground for postconviction relief. V.A.M.R. Crim. Rule 27.26.

10. Criminal Law (Key) 532

In view of trial court's opinion that statement given by defendant "is and should be admissible in evidence" supported by cogent and convincing evidence, allowing statement to go to jury did not violate Supreme Court decision establishing procedure for admission of confession.

John C. Danforth, Atty. Gen., Kenneth M. Romines, Asst. Atty. Gen., Jefferson City, for respondent.

Mark M. Hennelly, St. Louis, for appellant.

BARRETT, Commissioner.

In 1952 James William (known to one and all as "Slick") Stidham was sentenced to 25 years' imprisonment for his part in the armed robbery of the Grapette Bottling Company in Joplin. For the details of that crime see State v. Stidham, Mo., 258 S.W.2d 620. On October 3, 1955, after a jury trial and verdict in July 1955, Stidham was sentenced to life imprisonment for his participation in the slaying of fellow-inmate Walter Lee Donnell on September 22, 1954, at the height of the riot of approximately 800 inmates of the main prison in Jefferson City. In the trial of the latter case and now, at the behest of Father Clark, he has been represented by a distinguished lawyer, Mr. Mark M. Hennelly, then a successful and experienced criminal lawyer, now a vice-president and general counsel of one of the larger railroads. The murder conviction was appealed upon a full transcript of three volumes, there

was a complete appellate review, the opinion was turned into twenty-three headnotes, after counsel raised what he deemed, no doubt every conceivable point and error. That conviction of murder was affirmed on September 9, 1957, in State v. Stidham, Mo., 305 S.W.2d 7. In view of some of the problems now raised it should be pointed out that before the murder case reached trial stage Stidham's diligent counsel filed every conceivable motion and plea, including the right to a change of venue which accounts for the trial in Butler County, many miles from Jefferson City. Over the years, following the affirmation of the life sentence, Stidham has lodged in this court innumerable letters, communications and pro se motions and they have all been responded to. In June 1966 he personally filed and argued an appeal from a 27.26, V.A.M.R. proceeding in Butler County in which he attempted to present several of the issues now before the court. State v. Stidham, 403 S.W. 2d 616. In the meanwhile the court en banc revised its post-conviction procedure, and Stidham having unsuccessfully instituted another 27.26 proceeding, this court set aside its affirmance of the prior post-conviction judgment and remanded the cause for an amendment of the motion to vacate "which includes every ground known to the prisoner," and in the spirit of the rule for "a full evidentiary hearing" on all questions of fact. The order and judgment in that opinion is reported in State v. Stidham, 415 S.W.2d 297. And on that proceeding, on Stidham's behalf, there has been a change of venue from Butler County and there has been a new and complete hearing before Honorable Michael F. Godfrey, a circuit judge in St. Louis. Furthermore, in response to what was deemed to be the spirit of the Bosler cases, (Bosler v. Swenson, 8 Cir., 363 F.2d 154 and Swenson v. Bosler, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33) the court en banc set aside the judgment of this court upon the original appeal, 305 S.W.2d 7, and again appointed Mr. Hennelly

to represent Stidham in both cases. As indicated, there was a full hearing on the 27.26 proceeding, all issues were found against Stidham and he has appealed the judgment in that case. In the order setting aside the original submission the two causes were consolidated and are to be disposed of in this opinion. It should be stated in this connection that Mr. Hennelly has raised, extensively briefed, and orally argued every conceivable claim of error in the original trial, all of which covers and includes every possible right to relief in a post-conviction proceeding.

One of the claims of infringement of due process is that the state was "allowed to prove and the jury was instructed to consider a crime not included in the indictment." Const.Mo. Art. I, Sec. 18(a), V.A.M.S. Thus, it is said, he was indicted for the murder of Donnell, but he "was not, however, indicted for participating in a conspiracy to kill Donnell." Therefore, it is urged that the court erred in admitting in evidence conversations and conduct on the part of others engaged in slaying Donnell. By the same token it is contended that the court prejudicially erred in instructing the jury in referring to and hypothesizing a concert of action, an aiding and abetting in slaying Donnell. In the first place the argument overlooks not only the theory but the specific allegations of the indictment. And in the second place it ignores the facts of Donnell's killing, the circumstances in which he was savagely murdered. While Stidham, as well as his codefendants, was given a severance, the indictment charged that "William R. Hoover, Jackie Lee Noble, Paul Edward Kenton, James William Stidham, Rollie Laster, Don Wm. DeLapp and Joseph M. Vidauri[1]

1. The details of Donnell's murder are set forth in the records and appeals of Stidham's codefendants: State v. Laster, 365 Mo. 1076, 293 S.W.2d 300 (certiorari denied 352 U.S. 936, 77 S.Ct. 237, 1 L.Ed.2d 167); State v. Noble, Mo., 387 S.W.2d 522; State v. Kenton, Mo., 298 S.W.2d 433; State v. Vidauri, Mo., 293 S.W.2d 955 and State v. Vidauri, Mo., 305 S.W.2d 437.

* * * did then and there feloniously, wilfully, deliberately, premeditatedly, on purpose and of their malice aforethought, make an assault upon one Walter Lee Donnell and then and there with dangerous and deadly weapons, to wit: a sledgehammer, and a knife, and another sharp instrument or dagger * * * a wooden table leg, and other blunt instruments * * * and their fists and hands and feet * * * strike, hit, stab, cut, beat and stomp" and thereby kill Donnell. The testimony was that Kenton held Donnell while Laster stabbed him with an ice pick, Stidham "slashed" him with a knife, and two others hit him in the head with a sledgehammer. In addition to other bruises and contusions an autopsy on Donnell's body revealed "a severe mashed in, or compressed area in the right side of the face approximately just underneath the right eye, that extended back, involving the right ear with separation of the lower part of the ear, lower part of the ear was torn away from the body about a third of its normal attachment area." There was a multiple, crashing, "eggshell type fracture" of the skull, two knife-cut wounds of the neck, five puncture or stab wounds in the chest and four stab wounds in the back. The doctor said that two of the stab wounds had entered the heart cavity and of course were fatal. The testimony showed that until the three doors to Death Row were forced and Stidham and Laster released and Stidham furnished a knife DeLapp led the group bent on killing Donnell. As soon as Stidham was released DeLapp put his arm around Stidham's shoulders and said, "Gentlemen, I have brought you this far, this is your leader from here on." And shortly this group gained entrance to Donnell's cell and killed him. Prior to the riot Stidham had repeatedly threatened to kill both Donnell and James M. Creighton.

[1] This briefly narrated record completely refutes the appellant's claim of an invasion of due process in

submitting "a crime not included in the indictment." The indictment did not in terms charge the misdemeanor offense of conspiracy (RSMo 1959, §§ 556.120, 556.130, V.A.M.S.), even though inherent in the circumstances it may have been an incidentally included offense. Principal instruction number 4 hypothesized that the seven named defendants "entered into a conspiracy and agreement" and "acting in concert and together" and "aided, abetted, assisted or encouraged" in slaying Donnell but, as indicated, the evidence supports the hypothesis. There was a separate conventional instruction defining "conspiracy" stating that "all persons are principals who are guilty of acting in concert and together in the commission of a crime."

[2] The latter instruction was not only warranted by specific statute (RSMo 1959, § 556.170), upon this record, as the court held on the previous appeal, State v. Stidham, 305 S.W.2d l. c. 15, "there was ample evidence for a finding of the conspiracy submitted and the actual participation in and consummation of the said conspiracy by the persons named in the instruction." A case directly in point in every respect is State v. Holloway, 355 Mo. 217, 195 S.W.2d 662, an instance of a murder in a jailbreak. Excerpting, the court said, "Goldie and Buster were co-conspirators with appellant. Their testimony was competent in establishing the fact of the common design or conspiracy. * * * Conversations between Goldie and Buster were competent evidence against appellant although made outside of appellant's presence. * * * Furthermore, *proof that appellant and others conspired together to commit an unlawful act and that the killing occurred in furtherance of the conspiracy may be shown under an indictment or information charging first degree murder only.*" (Emphasis supplied.)

Relying on Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217, appellant contends that due process was violated in that the state knowingly used perjured testimony. This assignment is leveled at the state's use of Herman Trout and James Creighton, also prison inmates, as witnesses. (For a partial review of Creighton's bizarre life from a sentence of death in 1932 to a commutation of prison sentence in 1956 see State v. Creighton, 330 Mo. 1176, 52 S.W.2d 556.) The argument now is directed solely to the fact that the sentences of Creighton and Trout have been commuted and they have been released from prison. In the trial of this cause there was first a motion to disqualify Creighton as a witness upon the allegation that he was of unsound mind. That motion was heard at length, all medical and psychiatric records from the State Hospital at Fulton were introduced, and the court found as was all but obvious that he was indeed not incompetent as a witness. See State v. Stidham, 305 S.W.2d l. c. 13. Upon the original trial and appeal it was sought to establish the claim of perjured testimony or incompetent witness by offering to prove that while Creighton was held in the Cole County jail he was granted special favors, particularly that "he had access to one Mary Annis" (305 S.W.2d 7) despite the appellant's proof from the Fulton Hospital records that Creighton "is a homosexual."

[3] In any event and apart from the federal cases, this court has long since "recognize(d) that a judgment obtained by the knowing use of perjured testimony should be vacated upon a proper factual showing." State v. Garton, Mo., 396 S.W.2d 581. The insuperable difficulty with this particular claim of infringement of due process is that it is not supported by the record. Annotation 3 L.Ed.2d 1991. The only circumstance now present as to both Creighton and Trout is the fact that in July 1955 they did testify as state's witnesses and subsequently

their sentences were commuted by the then Governor of Missouri. And again, on this issue, there was a hearing on the 27.26 motion and aside from the bare fact of the commuted sentences the court found as did another court in 1964 (State v. Stidham, 403 S.W.2d 616) that "(t)he record is barren of facts to support such allegations." It is not necessary to detail their testimony, their evidence and that of numerous other witnesses is all set forth in the appeals of at least five of the participants in Donnell's slaying. On the 27.26 hearing the trial court could have added, after reading the record in Stidham's original appeal, that the testimony of Creighton and Trout was cogently corroborated in every detail by a number of physical facts and by other witnesses, particularly by the prison guard, Mr. Dietzel, on duty in Death Row when Donnell was murdered. In contrast to the testimony of Creighton and Trout there is no corroboration whatever of Stidham's testimony that he went up to B-Hall and spent the night of the riot innocently listening to the radio, had no knowledge of Donnell's slaying and took no part in the riot. The one incriminating circumstance that even he has never and cannot brush away is the conceded fact that after the three doors to Death Row were broken open and after his cell was unlocked he, unlike others and undoubtedly contrary to prison rules, did leave Death Row. Thus upon this record there was no support for the charge of knowing use of perjured testimony.

A further due process point is the claim of the "court's failure to make timely appointment of counsel." Here the appellant relies upon Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 and other landmark cases dealing with the appointment of counsel. It is not necessary here to again examine those cases, their standards

are recognized and applied even though the Miranda and Escobedo cases are not retroactive. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882. There is no factual similarity in this and any of the cited cases, particularly, for example, as in White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193, and Arsenault v. Massachusetts, 393 U.S. 5, 89 S.Ct. 35, 21 L.Ed.2d 5, in which there were pleas of guilty at the preliminary or "at a probable cause hearing" and the pleas were introduced in evidence upon the jury trials. In certain instances in which there has been manifest injustice, this jurisdiction recognized the importance of the right to counsel long before Escobedo and Miranda. See Ex parte Stone, Mo.App., 255 S.W.2d 155; State v. Jackson, 344 Mo. 1055, 130 S.W.2d 595 and State v. Witt, Mo., 422 S.W.2d 304.

The appellant's complaint as to counsel arose in and for the most part is based upon these circumstances: Initially the prosecution of these seven defendants for this particular offense was instituted by the prosecuting attorney in a magistrate court and preliminary hearings were held, a necessary prerequisite and procedure before a formal information could be filed in the circuit court. RSMó 1959, § 544.250. Appellant and his counsel make much ado of the fact that at one of these preliminary hearings he demanded counsel and yelled out asking for some lawyer to come forward. In his brief it is said that there was no appointment of an attorney "until the second arraignment" and in this connection stated that he was never advised of his right to a lawyer—even though he requested one at the preliminary—and that he was entitled to counsel before his mental examination at the United States Medical Center in Springfield.

[4] The basic fallacy in the appellant's contention on this phase of the case is that again there is no factual

basis for his claim of an infringement of rights at a preliminary. In the first place there is neither claim nor proof that anything done or said at any preliminary hearing or in any medical or mental examination was employed against him or that the state even secured any relevant information. State v. Smith, Mo., 411 S.W.2d 208. But more important and decisive here as to counsel at a preliminary hearing is the fact that Stidham was not prosecuted by information. On November 23, 1954, a grand jury returned an indictment charging Stidham and his accomplices with the murder of Donnell. Thus there was no occasion or place for a preliminary hearing. "It is a well-established law of this State that the grand jury may investigate and indict one charged with a felony although he has been arrested and held for a preliminary examination, and is not bound to await the action of the examining court, for the reason that the action of the examining court is no bar to the right of the grand jury to inquire into the case and indict the accused, even though he has been discharged on the preliminary examination." State v. Gieseke, 209 Mo. 331, 339, 108 S.W. 525, 527.

[5] As a matter of fact, other than appellant's assertions, there is no record support for his charges of lack of counsel prior to trial. Whatever may have occurred at any preliminary has not been made a part of this record. In any event, as stated, an indictment was returned, the defendants, the indisputable record recites, were duly arraigned, each defendant was furnished a copy of the indictment and upon the request of Stidham for the appointment of a certain lawyer, the court appointed Mr. Hennelly. Thereafter there were no motions or proceedings or even references to a preliminary hearing or to anything that may have occurred during such a hearing. Mr. Hennelly was appointed to represent appellant on November

23, 1954, and on December 6, 1954, a formal plea of not guilty was entered. Almost immediately, on December 14, 1954, on Stidham's behalf, there were motions for production and inspection of any statements that may have been given, a motion to dismiss for the reason of two offenses—homicide and assault with intent to kill, a motion for a severance, a motion for a polygraph examination and a motion to suppress any statement he may have given. These procedures were all considered in turn and disposed of, including a motion for a continuance and finally an application for a change of venue. The cause proceeded to trial and in the first instance a mistrial was declared when it was discovered that certain jurors were reading newspaper accounts of the trial. In the present 27.26 proceeding, after an unrestricted hearing, the court found these issues with respect to counsel against appellant, that is the court found that failure to appoint counsel at any preliminary stage of the cause or during his interrogation by police and prison authorities had not infringed any of appellant's constitutional rights and that finding is convincingly supported by the record. State v. Donnell, Mo., 430 S.W.2d 297; Crosswhite v. State, Mo., 426 S.W.2d 67. As a matter of fact appellant's interrogation in connection with the prison riot and Donnell's slaying is more appropriately considered in connection with his assertion of involuntary confession.

There is a threefold assignment of error in this respect, neither of which would necessarily result, as the appellant seems to think, in his exoneration and release from imprisonment. It is first urged in general terms that the court erred in admitting in evidence exhibit 16, his own handwritten confession. It is said that its admission deprived appellant "of his liberty without due process of law." This allegation is not a briefed and argued point; in connection with it, however, it is contended that the court's

procedure for determining voluntariness "did not comport with the minimum standards" of due process in that "no specific finding of voluntariness was made by the judge prior to submitting the issue to the jury." In the second place it is said that under the evidence "the alleged confession was coerced, involuntary, and taken in violation of the defendant's Constitutional rights," meaning presumably, that upon the record the confession was involuntary as a matter of law. A third and connected point is that the instruction submitting the issue to the jury was erroneous "by failing to properly instruct the jury on the Constitutional standards to be used in making their determination as to the voluntariness" of the confession. The latter point is not too clear—in some aspects it would seem to say that a question of law should have been submitted to the jury. In the argument of this contention, presented as a separate point, it is said that the jury was given an "unconstitutional standard." At another point it is said that the instruction failed to include or submit "mental coercion or duress" and, therefore, under State v. Williams, Mo., 369 S.W.2d 408, was prejudicially erroneous. Thus the complete gamut of involuntary confessions is sought to be invoked one way or another.

It is necessary at this point and as to all claims of involuntary confession to have some understanding of the record and the context and manner in which they arose. In this case, in addition to all other motions, there was a separate motion to suppress "any and all statements," oral or written, that Stidham may have made for the specified reason that the "alleged statements were involuntary and *as a result of physical force and threats of physical force applied against this defendant* by police officers of the City of St. Louis, guards of the Missouri State Penitentiary and officers of the Missouri Highway Patrol." (Emphasis sup-

plied.) That motion was filed on December 14, 1954, and the record recites that it was overruled on December 20, 1954. That motion was filed and passed on while the cause was pending in Cole County and it does not appear just what if any evidence was heard before the court passed on the motion. Thereafter, when in the course of the trial in July 1955 it appeared for the first time from the testimony of a highway patrol sergeant that Stidham's oral and written confessions were to be employed defendant's counsel, even in 1955, and unlike in State v. Williams, "moves the Court to conduct a preliminary examination and asks the Court to inquire into the voluntariness of the statement, and to determine whether the statement was given voluntarily, either the oral or the written statement." Thereupon the court interrupted the trial and out of the jury's presence and hearing conducted a hearing on appellant's motion.

Highway patrol officers, St. Louis police, prison officials and all others present when Stidham's statements were made or given were examined at length and in detail as to the circumstances in which they were given. It is not necessary to detail the circumstances, Stidham in testifying upon the trial and the motion said that after he was taken to the field house in the recreation area where the investigation into the riot and, incidentally, Donnell's murder, was being conducted, he was handcuffed, "a rope (was fastened) between the handcuffs * * * I was lifted up in the air where all my weight had to bear on my two arms." He said that the police officers and patrol officers, fifteen to twenty, left him thus suspended from the ceiling for fifteen minutes and then because he refused to give a statement they again lifted him up and beat him with cork ball bats until he passed out. And, he said, that as a result of this treatment "I agreed to write a statement that they dictated to me."

And so after his oral statements and despite his paralyzed arm he wrote the statement and the officers, unspecified, forced him to sign it.

[6-8] Contrary to Stidham's testimony the several officers who took part in the interrogation, accounted for Stidham's presence, every minute of time, and his treatment from the time on September 22nd he was moved from Death Row to O-Hall and finally on September 27th when he was escorted from O-Hall to the recreation area and his interrogation which lasted less than thirty minutes. Incidentally Stidham was confined in solitary in Death Row as punishment and for safekeeping because of an attempt to escape the previous January. Creighton was likewise an incorrigible and confined in Death Row, a maximum security area, as punishment. And the inference is that Donnell, thought by the prison population in general and Stidham and his friends in particular to be a snitch was confined there for his personal safety. In any event, the officers, one by one, denied the use of force, threats or violence. Donnell was murdered on September 22nd and the officers say that except in passing Stidham was not questioned until he gave the statements on September 27th. He claims, however, that when he was moved to O-Hall he was placed in a bare cell, without running water, that the windows were broken and he was only allowed "to keep a pair of pants and shoes on" and he said that he was not "giver any food or water for three days." All of this testimony was denied by the prison authorities even though during a part of the time order had not been restored and some buildings were still burning. Without narrating even briefly, the testimony in contradiction of Stidham's uncorroborated claims was all but overwhelming and even giving some credence to his version the circumstances do not approach those of Brooks v. Florida, 389

U.S. 413, 88 S.Ct. 541, 19 L.Ed.2d 643, which "case documents a shocking display of barbarism." And again, after overruling the latter motion to suppress, all these witnesses testified to the same facts and circumstances and upon this testimony the issue of voluntariness was submitted to the jury. There was in point of fact upon the trial of the cause no claim of mental coercion, the claim was that the oral and written confessions were obtained by physical force and violence. And this is what Mr. Hennelly argued to the jury, it was not until his 27.26 hearing, thirteen years later, that there was a claim of mental duress. In these circumstances, as upon the original appeal, the then conventional instructions on voluntary confession were not prejudicially erroneous. State v. Laster, 365 Mo. 1076, 293 S.W.2d 300; State v. Stidham, Mo., 305 S.W.2d l. c. 16-18.

[9] In view of the insistent argument one other matter should be noted. In addition to his oral statements this is Stidham's confession, admittedly written by him:

> "Kenton held Donald while Laster stabbed him several times with a ice pick, at the same time I slashed at him three or four times around the face and neck with a knife that Kenton gave me when he opened the door, when Donald fell to the floor Linder and Thompson each said get Donald with the sledge and they proceeded to hit him with a sledgehammer and crowbar; during this time someone was holding a flashlight that Kenton previously had. When we left the cell Donald was lying on his back with his head pointed toward the door. The knife I had was a regular kitchen knife about six or seven inches in length, when I got back upstairs in B-Hall, I threw the knife on the floor near the west end on the south side of the building."

In this statement, according to the appellant, there are three errors which he says demonstrate that the six officers signing as witnesses dictated the statement thus conclu-

sively establishing that the statement was not voluntary. The statement recites his age as 25 when in fact, as shown by his birth certificate, he was 28. His residence was given as Kansas City when in fact he had not lived there and, three, although not to be found in the statement that he was credited with three prior felony convictions when in fact he had but two—one, he says, having been "nullified." The officers all say that they had no personal knowledge of these items except as Stidham wrote them in his statement. And to further confuse this issue when he was in the medical center in Springfield the documents he introduced in evidence show that in two instances he gave his age as 32. If these details are of any significance upon the issue of voluntariness it could be pointed out that in the statement Creighton's name is misspelled "Crayton" and repeatedly Donnell's name is misspelled "Donald" and he does not claim that the officers directed him to thus misspell these names. And more significantly as to the slaying of Donnell, the statement says that "Paul Kenton unlocked my door" but upon his 27.26 hearing, years later, he says "It was some colored fellow. I don't remember who it was. I think it was Ford." Thus not only is there a direct conflict in the testimony, upon the appellant's own version there looms a large credibility gap. And in this connection, by the time Stidham was brought to the interrogation center on the 27th of September there was but little point in obtaining a statement, let alone a confession, from him. By that time the guards had all been released from the rioters' custody and the cells, particularly Mr. Dietzel, and they along with Stidham's co-defendants had supplied all the details of the riot as well as the killing of Donnell. By the time Stidham gave his statements there was no mystery as to Donnell's death or as to Stidham's part in it and upon this record the statement played but little if any part in his conviction.

All that has gone before in this opinion is but background and preliminary to appellant's principal claim that the trial of his case, particularly as to his oral statements and his confession, does not meet the standards of Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908; Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895; Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; Brooks v. Florida, supra, and numerous other landmark federal cases concerned with the subject of voluntary confessions. It is not necessary here to attempt an explication of these cases, that has been done several times and their mere citation indicates an awareness of their significance and controlling force. One of the latest explications of these and numerous other cases is Parker v. Sigler, 413 F.2d 459 and it is sufficient here to say that the interpretation of the Eighth Circuit Court of Appeals is accepted.

[10] The first and basic weakness of appellant's presentation is his failure to recognize that unlike Jackson v. Denno this jurisdiction does not apply or follow the so-called New York rule in determining the voluntariness or involuntariness of confessions, Missouri employs the so-called Massachusetts procedure "impliedly approved in Jackson v. Denno," State v. Washington, Mo., 399 S.W.2d 109, 114. Upon the trial of this case, after the appellant's motion and the indicated hearing before the court, out of the jury's hearing, the court made this order: "* * * it is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opin-

ion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that *the statement is and should be admissible in evidence.*" Only a single word is missing, the court unfortunately did not in the italicized clause employ the word "voluntary," nevertheless, the meaning and intent are implicitly plain. "Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity." Sims v. Georgia, 385 U.S. 538, 544, 87 S.Ct. 639, 643, 17 L.Ed.2d 593, 598. It is not necessary to again detail the conflicting evidence and demonstrate, as indicated from even a brief recitation upon the "totality of the circumstances" (Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423) the judge's finding of voluntary confession, prior to submission to the jury, was indeed supported by cogent and convincing testimony. State v. Hester, Mo., 1425 S.W.2d 110; Crosswhite v. State, Mo., 426 S.W.2d 67; State v. Williams, Mo., 416 S.W.2d 956; State v. Glenn, Mo., 429 S.W.2d 225.

And if this does not suffice, thirteen years later, upon the 27.26 hearing the appellant was again given full opportunity to attack the previous finding and record and he did so but the court on change of venue found the issues against appellant. It may be interpolated that upon the latter hearing he for the first time attempted to inject the issue not alone of a confession produced by "police brutality" but of mental duress and coercion. But here he attempts to connect the murder of Donnell and the events of September 22 and 27, 1954, with his prior confinement and general treatment for infraction of rules and attempt-to-escape events and treatment completely disassociated with the riot and slaying. Needless to say, these are "scarcely factors of involuntariness in a plea." Verdon v. United States, 8 Cir., 296 F.2d 549, 552. But again and

upon this issue and in the new 27.26 hearing the patrol, police and prison officials were again called, including Patrolman Barton whom Stidham had accused as one of his tormentors and he denied that he ever at any time interrogated or handled Stidham, although he had talked to Creighton, Trout, Laster, Noble, Hoover, DeLapp and Vidauri. In any event all these witnesses, all produced by the state, categorically or implicitly refuted all of Stidham's claims of mistreatment, either physical or mental. And upon this new hearing and record another circuit judge made another complete finding of law and fact. The court found, citing the Glenn and Washington cases, supra, that Judge Randolph Weber in 1954 had "followed the correct procedure in determining the issue of voluntariness of the confession and specifically made a finding relative thereto and this Court now so finds that the correct procedure was utilized." And finally the court found, as had the previous court, that the oral and written confessions were voluntary and, needless to add, the latter finding is overwhelmingly supported and procedurally and factually the cause meets all the requirements of the federal cases and there has been no invasion of due process. Crosswhite v. State, State v. Glenn and State v. Williams, supra.

Accordingly the original judgment, State v. Stidham, Mo., 305 S.W.2d 7, is affirmed and the judgment in the 27.26 proceeding is likewise affirmed.

STOCKARD and PRITCHARD, CC., concur.

PER CURIAM:

The foregoing opinion by BARRETT, C., is adopted as the opinion of the court.

All of the Judges concur.

APPENDIX G—Opinion in: Stidham v. Swenson, Federal Habeas Corpus, Civil Action No. 18121-2

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JAMES WILLIAM STIDHAM,
Petitioner,
vs.
HAROLD R. SWENSON,
Respondent.

Civil Action No. 18121-2

Memorandum and Order Denying Petition for Habeas Corpus

(Filed May 15, 1970)

Petitioner is an inmate of the Missouri State Penitentiary serving a sentence of life imprisonment upon conviction of a first-degree murder. Petitioner filed a petition for habeas corpus asserting that his conviction is void because it was rendered without due process of law and in violation of the Fifth, Sixth, and Fourteenth Amendments.

In May, 1952 petitioner was sentenced to a 25-year term in the Penitentiary for robbery. While serving his term, he was accused and convicted in 1955 of killing another inmate, for which he was sentenced to a life term. Petitioner appealed his conviction which was affirmed by the Supreme Court of Missouri in 1957. See 305 S.W. 2d 7. In 1964 he filed a 27.26 motion to vacate his sentence which was denied without an evidentiary hearing. On appeal, the Missouri Supreme Court affirmed. See 403 S.W. 2d 616. Thereafter, petitioner filed a second 27.26 motion alleging new grounds, which was also denied without an evidentiary hearing by the trial court. The Supreme Court of Missouri reversed and remanded on appeal (415 S.W. 2d 297) and

on December 5, 1968, an evidentiary hearing was held in the St. Louis City Circuit Court. This hearing resulted in a denial of relief under the 27.26 motion, which judgment was appealed to the Supreme Court and consolidated with another appeal for hearing by the court en banc. The Supreme Court on February 9, 1970 affirmed the decisions of the lower courts. 449 S.W. 2d 634.

Petitioner then filed a petition for habeas corpus in this Court, and on March 2, 1970, a show cause order was issued, since it appeared that petitioner had exhausted his available state remedies and might have stated a violation of one or more of his federally protected rights. The respondent filed with this Court, in response to the show cause order, the transcripts of the records on appeals (Missouri Case Nos. 45537 and 54674), briefs and arguments of the parties, and the opinions of the Supreme Court of Missouri. It appears to the Court that this record is complete and that it fully demonstrates that the petitioner has exhausted his available state remedies.

The petitioner alleges seven grounds for relief: (1) that he was tried and convicted upon a charge of conspiracy which was not included in the indictment; (2) that he was deprived of assistance of counsel at two critical stages of his trial; (3) that he did not knowingly or competently waive the assistance of counsel at any stage of the proceedings against him; (4) that certain members of the Missouri State Highway Patrol and personnel of Missouri State Penitentiary exerted physical and mental punishment upon him to secure a confession from him; (5) that the trial judge admitted the confession into evidence without first making a clear and specific finding that the said confession was voluntary; (6) that Instruction No. 6 given at the trial did not fully set out the constitutional standards for the jury's guidance to determine the voluntariness of the said con-

fession; and (7) that the State of Missouri knowingly used perjured testimony of two convicts to obtain the conviction of petitioner.

The facts are fairly well set out in *State* v. *Stidham*, 305 S.W. 2d 7. Very briefly, in 1952 petitioner was sentenced to 25 years' imprisonment for his part in the armed robbery of Grapette Bottling Company in Joplin, Missouri. (See *State* v. *Stidham*, 258 S.W. 2d 620.) On October 3, 1955, after a jury verdict of guilty, petitioner was sentenced to life imprisonment for his participation in the murder of a fellow inmate, Walter Donnell, on September 22, 1954, during the riot of 800 prisoners in the Missouri State Penitentiary.

Petitioner's first contention is that the state was allowed to prove and the jury instructed upon the charge of conspiracy to murder which was not included in the indictment. The indictment did not charge conspiracy; but it did charge seven persons with the murder of Donnell. Even though petitioner and the other named defendants were granted severances, the indictments in each trial named all seven of them. Further, the evidence showed that the defendants had acted in concert. An objection was leveled against Instruction No. 4 because it hypothesized that each had entered into a conspiracy and had acted in concert and "aided, abetted, assisted or encouraged" in the slaying. Under Missouri law all persons who are guilty of acting in concert in the commission of a felony are considered principals and are charged, tried, convicted and punished in the same manner. (See V.A.M.S., § 556.170.) There is no merit to the claim that murder and conspiracy to commit murder (which was in fact accomplished) are such different charges that petitioner could not have been prepared to defend himself. Furthermore, there is direct authority for instructing and proving a con-

spiracy to commit murder under an indictment charging first-degree murder. *State* v. *Holloway*, (Mo. Sup.) 195 S.W. 2d 662 (cited by the Missouri Supreme Court) states:

> (P)roof that appellant and others conspired together to commit an unlawful act and that the killing occurred in furtherance of the conspiracy may be shown under an indictment or information charging first degree murder only.

Petitioner next contends that he was deprived of effective assistance of counsel at two critical stages of his trial and that he did not knowingly or competently waive such assistance at any time. These times were while he was being interrogated by the police and at his first arraignment.

Factually, there were two arraignments. The first was instituted by the prosecuting attorney on an information in the magistrate court. There petitioner demanded counsel, and shouted out in the courtroom for counsel, but his request was denied. A plea of not guilty was entered for petitioner. Preliminary hearings were held as required by V.A.M.S., § 544.250. Petitioner was later rearraigned on an indictment returned by the grand jury of Cole County, and at that time counsel was appointed for him. Petitioner contends that this late appointment of counsel resulted in the denial of effective assistance of counsel under the standard of *Powell* v. *Alabama*, 287 U.S. 45.

The failure to appoint counsel at interrogation has been established as a denial of due process by *Escobedo* v. *Illinois*, 378 U.S. 478, and *Miranda* v. *Arizona*, 384 U.S. 436. However, these cases are not retroactive (*Johnson* v. *New Jersey*, 384 U.S. 719) and do not control here.

The more serious question concerns the failure to appoint counsel at the time of the first arraignment, which

petitioner claims resulted in denial of due process. Petitioner cites *Hamilton* v. *Alabama*, 368 U.S. 52, *White* v. *Maryland*, 373 U.S. 59, and *Arsenault* v. *Massachusetts*, 393 U.S. 5, as authority. The Missouri Supreme Court in their opinion 449 S.W. 2d 634 distinguished the latter two cases by stating that "(t)here is no factual similarity in this and any of the cited cases . . . (citing *White* v. *Maryland, supra*, and *Arsenault* v. *Massachusetts, supra*) in which there were pleas of guilty at the preliminary or 'at a probable cause hearing' and the pleas were introduced in evidence upon jury trials." However, in *Hamilton* v. *Alabama*, from which the holdings in *White* and *Arsenault* were drawn, the petitioner, at arraignment without counsel being appointed, pled not guilty. The Supreme Court held that the arraignment is a critical stage in a criminal proceeding, and the failure to appoint counsel to represent the defendant at that time is a denial of due process. The court stated at page 55:

> When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted. (Citing cases.) In this case . . . the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.

The respondent and the Missouri Supreme Court opinion state that no infringement of rights occurred for two reasons. The first is that "There is neither claim nor proof that anything done or said at any preliminary hearing or in any medical or mental examination was employed against [Stidham] or that the state even secured any relevant information." (448 S.W. 2d at 639.) More decisive, according to the court, is the fact that Stidham was not prosecuted by information (under which the preliminary hearings had been held) but rather by an indictment re-

turned on November 23, 1954. "Thus there was no occasion or place for a preliminary hearing." Petitioner, along with his six co-defendants, were arraigned under the information on September 29, 1954; the information was dismissed and the indictment was returned on November 23, 1954. On this date counsel was appointed, and petitioner was rearraigned with the presence of counsel on December 6, 1954.

The important question is whether the arraignment and preliminary hearing are critical stages in the proceedings in Missouri. Under Missouri law, a defendant is not required to assert any right, plea or defense at the arraignment in order to preserve any statutory or constitutional rights. (V.A.M.S., § 546.020) Moreover, all rights, pleas or defenses are preserved inviolate. In *State* v. *Benson,* (Mo. Sup.) 415 S.W. 2d 773, it was held that the absence of counsel during arraignment is not, per se, a violation of the Sixth Amendment. In *Madison* v. *Tahash,* (C.A. 8) 359 F. 2d 60, the court held that the arraignment was not a critical stage of the criminal proceedings in Minnesota. *Donnell* v. *Swenson,* (W.D. Mo.) 302 F. Supp. 1024, extended the *Tahash* holding to cover arraignments in Missouri.

In *State* v. *Patrick,* (Mo. Sup.) 420 S.W. 2d 258, the preliminary hearing was held not to be a critical stage. This view is also supported by *Pope* v. *Swenson,* (C.A. 8) 395 F.2d 320, 322, in which the court stated, "We agree that denial of counsel at the preliminary hearing under Missouri law was not a constitutional infirmity in Pope's conviction, where the defendant pleaded not guilty and was otherwise not shown to have been prejudiced." See also *Nolan* v. *Nash,* (C.A. 8) 316 F. 2d 777; Cf. *Burnside* v. *State of Nebraska,* (C.A. 8) 346 F. 2d 88; *Holland* v. *State of Nebraska,* (C.A. 8) 416 F. 2d 1007.

Petitioner in this case did not plead, and, pursuant to V.A.M.S., § 546.020, a plea of not guilty was entered for him. At the second arraignment, petitioner pleaded not guilty, was furnished a copy of the indictment and, upon his request for a certain lawyer, the court appointed that attorney who represented him thereafter. Petitioner raises no complaints about the efforts of the attorney in his behalf. Petitioner has not shown that he was deprived of any rights by the failure to appoint counsel at the first arraignment, and, therefore, in line with the Eighth Circuit Court of Appeals, we hold that the failure to appoint counsel at that time was not a deprivation of rights.

Petitioner further asserts that the state knowingly used perjured testimony of two witnesses against him. The state used two prison inmates, Herman Trout and James Creighton, to testify; as proof of perjury, petitioner states that both prisoners had their sentences commuted and were released from prison on the same day.

In making such an allegation, the burden of proof is on petitioner to show both that the testimony was perjured and that such testimony was knowingly and intentionally used by the prosecuting attorney in order to obtain a conviction. *Anderson* v. *United States,* (C.A. 7) 403 F. 2d 451; *Smith* v. *State of Florida,* (C.A. 5) 410 F. 2d 1349, and cases cited therein; *Enzor* v. *United States,* (C.A. 5) 296 F. 2d 62; *United State* v. *Jenkins,* (C.A. 3) 281 F. 2d 193. The petitioner has not met this test. His allegations and the record are devoid of any proof of perjury or willful use of perjury by the state. Furthermore, petitioner concedes that he has no direct proof, but contends that the circumstantial evidence, that of commutation of sentence less than six months after Stidham's trial, is sufficient proof to indicate perjury in line with *Napue* v. *Illinois,* 360 U.S. 264. That case is not controlling here because there

was express proof of a "deal" between the prosecutor and witness in the case. Here there is no such proof.

Petitioner's three remaining contentions relate to the issue of voluntariness of his confession. He asserts that he was coerced by physical and mental punishment to confess, that the confession was admitted without a finding by the trial judge that it was voluntary, and that the instruction given at the trial did not fully set out the constitutional standards for the jury's guidance in determining the issue of voluntariness.

In regard to petitioner's first allegation, he relies mainly upon the cases of *Clewis* v. *Texas*, 386 U.S. 707, and *Davis* v. *North Carolina*, 384 U.S. 737. Both cases use the criterion of "totality of circumstances" in determining whether the confessions were voluntary. The respondent and the Missouri Supreme Court opinion lend little credence to Stidham's testimony because "Without narrating even briefly, the testimony in contradiction of Stidham's uncorroborated claims was all but overwhelming . . ." This not unexpected. The Supreme Court in both *Clewis* and *Davis, supra*, commented, "As is almost invariably so in cases involving confessions obtained through unobserved police interrogation, there is a conflict in the testimony as to the events surrounding the interrogation."

It is necessary to review the uncontroverted facts in order to determine this issue. The murder was committed on September 22, 1954 and Stidham confessed on September 27, 1954. He was questioned intermittently up until that time concerning his part in the murder. He had very little food and very little sleep. At no time during this period was he informed of his right to counsel or to remain silent. In fact, he asserts that an attempt to get an attorney was thwarted when the prison authorities refused to allow a letter to be mailed. On the 27th, Stidham was

taken to the Athletic Building and questioned by a number of officers who had hand guns and riot guns in their possession. Stidham asserts that he was physically abused and rendered unconscious at this time, and these acts resulted in his confession. Before and after the interrogations Stidham was in solitary confinement and no visitors, including parents or priest, were allowed to see him. Other uncontradicted facts indicated that Stidham was deprived of food for two days after his confession and that he lost 25 pounds during the period of interrogation.

He had consistently denied all involvement in the murder up until the time of his confession.

The most damaging of the factors considered in the totality of the circumstances is the failure to inform petitioner of his rights. *Miranda* v. *Arizona*, 384 U.S. 436, has been determined not to be applicable retroactively. (See *Johnson* v. *New Jersey*, 384 U.S. 719.) However, it still remains that the failure to inform is a significant factor in determining the issue of voluntariness, although it is insufficient in itself to require the voiding of the confession. Wholly apart from the disputed facts, the statement of facts established by the record and as found at Stidham's 27.26 evidentiary hearing do not lead to the conclusion that such pressures were applied to Stidham as to result in overcoming his will to maintain his innocence.

Petitioner next attacks the procedure used by the trial court in determining the voluntariness of the confession, alleging that it is in violation of *Jackson* v. *Denno*, 378 U.S. 368. In that case, a constitutional rule was established that a jury was not to hear a confession unless and until the trial judge had determined that it was freely and voluntarily given. In *Sims* v. *Georgia*, 385 U.S. 538, the court further extended this holding at page 544:

The rule allows the jury, if it so chooses, to give absolutely no weight to the confession in determining the guilt or innocence of a defendant but it is not for the jury to make the primary determination of voluntariness. Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity.

Here, in accordance with a request of Stidham's counsel, the trial court conducted a preliminary examination inquiring into the voluntariness of the confession outside of the hearing of the jury. Witnesses were called and cross-examined. This hearing satisifed the requirement of *Jackson* v. *Denno, supra,* that there be a (1) reliable nonjury preliminary or post conviction determination of the issue of voluntariness, (2) uninfluenced by the truth or falsity of the confession (3) by procedures "fully adequate to insure a reliable and clear-cut determination, including the resolution of disputed facts upon which the voluntariness issue may depend."

At the conclusion of the testimony, the court made the following statement:

THE COURT: Now, at the conclusion of the hearing held outside of the hearing of the Jury, the request by the Defendant for a hearing upon the statement which has been identified as—

MR. RILEY: 16 and 16-1.

THE COURT: 16 and 16-1, it is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the

> Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted, so we may proceed with Sergeant Little, as to his identification before the Jury of the statement in question, Exhibit 16 and 16-1.
>
> MR. HENNELLY: In other words, the Court is overruling my Motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?
>
> THE COURT: That is right. Mr. Sheriff will you bring the Jury back in?

If the trial court had simply stated that he found the confession was voluntarily made after hearing the many witnesses who testified on this score, the matter would have been settled and this point could not be raised in this Court. There are many cases holding that a ruling by the Court that the evidence heard "makes a jury issue of the matter," or words of similar import, do not satisfy the rule of *Jackson* v. *Denno, supra.* And so the precise question presented here is whether the Court did find the confession involuntary or whether he failed to rule on that point and decided to let that question be decided by the jury.

The evidence in this case on behalf of the defendant, which the judge heard, was that he was subjected to brutal physical torture to induce the confession. If the judge had believed even a part of his testimony, he would have undoubtedly held the confession involuntary. The trial court held a full-scale evidentiary hearing on the voluntariness of the confession, and without actually using the word voluntary, directly held that he believed the state's witnesses and did not believe the defendant's testimony. This reasoning was supported by the direct ruling that he was denying the request of defendant's counsel to hold that the contested statement was involuntary.

It would be highly technical, in this day and age, to hold that the word "voluntary" was a word of art and, in its absence, a conviction by a jury, after a long trial, should be set aside because the judge ruled the statement was not involuntary instead of ruling that the statement was voluntary. It is the opinion of this Court that the statements and action of the judge does clearly indicate a finding of voluntariness, and is sufficient under the teachings of *Jackson* v. *Denno, supra,* and *Sims* v. *Georgia, supra.*

The petitioner's third attack is related to the second. Basically, he contends that since the judge made no specific finding of voluntariness, his instruction which did not require them to make a specific finding on the voluntariness of the confession was violative of *Jackson* v. *Denno, supra.* Since we have held that the trial court reliably determined the issue of voluntariness, it was not necessary for the jury to make a specific finding thereon.

Therefore, it is

ORDERED that the petition for habeas corpus be, and hereby is, denied.

/s/ Wm. R. Collinson
District Judge

APPENDIX H—Order Dismissing Appeal, Stidham v. Swenson, No. 20337 Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1969

James William Stidham,
Appellant,
vs.
Harold R. Swenson, Warden, Missouri State Penitentiary.
No. 20337

Appeal from the United States District Court for the Western District of Missouri.

Motion of appellant to dismiss the appeal from the United States District Court for the Western District of Missouri in this cause having been filed, and in pursuance of said motion,

It is now here ordered and adjudged by this Court that the appeal from the said District Court in this cause be, and the same is hereby, dismissed without prejudice.

And it is further ordered that the mandate in this cause issue forthwith to the said District Court.

June 24, 1970

APPENDIX I—Order of United States District Court Dismissing Reinstated Appeal in Stidham v. Swenson, No. 20337

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1969

James William Stidham, Appellant,

vs.

Harold R. Swenson, Warden, Missouri State Penitentiary.

No. 20337

Appeal from the United States District Court for the Western District of Missouri.

Judgment of this Court dismissing the appeal in this cause from the United States District Court for the Western District of Missouri was entered June 24, 1970. Our mandate issued to the aforesaid District Court on that date. The case now comes before the Court on consideration of appellant's motion to reinstate the appeal on our docket. Being fully advised in the premises, it is now here ordered that the motion be, and it is hereby, denied.

October 14, 1970

APPENDIX J—Opinion of the United States District Court in Stidham v. Swenson, No. 18771-2

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JAMES WILLIAM STIDHAM,
Petitioner,
vs.
HAROLD R. SWENSON,
Respondent.
} Civil Action No. 18711-2

Order Granting Leave to Proceed in Forma Pauperis and Denying Petition for Habeas Corpus

(Filed November 5, 1970)

On February 18, 1970, Stidham filed a petition for habeas corpus which was denied by this Court by order entered on May 15, 1970. *Stidham* v. *Swenson*, Civil Action No. 18121-2. Stidham filed a notice of appeal and a request for certificate of probable cause which was granted, along with leave to appeal in forma pauperis. On June 25, 1970, the Eighth Circuit Court of Appeals granted Stidham's motion to dismiss the appeal. At that time the Clerk of the Court informed Stidham that if he intended to renew his claims, he had to proceed anew in the district court.

On September 25, Stidham filed another petition for habeas corpus in this Court in which he by reference to his prior petition stated identical grounds for relief. Shortly before or at the same time he filed a motion to reinstate the appeal in the Court of Appeals, despite the instructions given to him when his appeal was dismissed. The Court of Appeals denied his motion.

The pertinent facts are set out in the order denying the petition for habeas corpus in Civil Action No. 18121-2

and need not be restated here. In that petition, Stidham stated seven grounds for relief, which were: (1) that he was tried and convicted upon a charge of conspiracy which was not included in the indictment; (2) that he was deprived of assistance of counsel at two critical stages of the proceedings against him; (3) that he did not knowingly or competently waive the assistance of counsel at any stage of the proceedings; (4) that certain members of the Missouri State Highway Patrol and personnel of the Missouri State Penitentiary exerted physical and mental punishment upon him to secure a confession from him; (5) that the trial judge admitted the confession into evidence without first making a clear and specific finding that the said confession was voluntary; (6) that Instruction No. 6 given at the trial did not fully set out the constitutional standards for the jury's guidance to determine the voluntariness of the said confession; and (7) that the state knowingly used perjured testimony of two convicts to obtain the conviction of petitioner.

By amendment to this petition herein, Stidham states an additional ground for relief, alleging that he was denied the right to confront and cross-examine a state's witness whose testimony as to certain implicating statements was objected to, the objection sustained, but the jury not instructed to disregard.

In regard to Stidham's seven allegations which are raised here for the second time and upon which this Court denied relief in the prior petition (18121-2), it is unnecessary to restate our findings, and we readopt them here. However, one point—that he was denied counsel at arraignment and preliminary hearing—does merit further consideration.

Factually, there were two arraignments. The first was instituted by the prosecuting attorney on an informa-

tion in the magistrate court. Although Stidham demanded counsel at that time, none was appointed. A plea of not guilty was entered for him. (V.A.M.S., § 546.020) Preliminary hearings were held as required by V.A.M.S., § 544.250. The information was later dismissed, and Stidham was arraigned again on an indictment returned by the Grand Jury of Cole County. At that time counsel (whom he had requested) was appointed for him. In the prior civil action (18121-2), we held that Stidham was not entitled to relief because the arraignment and preliminary hearing have been held not to be critical stages in Missouri. *State* v. *Benson,* (Mo. Sup.) 415 S.W. 2d 773; *State* v. *Patrick,* (Mo. Sup.) 420 S.W. 2d 258; *Madison* v. *Tahash,* (C.A. 8) 359 F. 2d 60; *Donnell* v. *Swenson,* (W.D. Mo.) 302 F. Supp. 1024; *Pope* v. *Swenson,* (C.A. 8) 395 F. 2d 320; *Nolan* v. *Nash,* (C.A. 8) 316 F. 2d 777.

Subsequent to our opinion in the prior habeas corpus action, the Supreme Court handed down *Coleman* v. *Alabama,* 399 U.S. 1, in which it was held that a preliminary hearing is a critical stage of a criminal proceeding, that counsel was essential to protect the accused against any erroneous or improper prosecution, and that the right of counsel under the Sixth Amendment is applicable to such proceedings.

Coleman was decided on June 22, 1970. The arraignment and preliminary hearing in question here occurred in 1955. Assuming, but not deciding, that *Coleman* would apply to the fact situation here, it must be determined whether or not *Coleman* is to be applied retroactively. Although the Supreme Court has not rendered a decision on this point, the Eighth Circuit Court of Appeals has expressly held that *Coleman* is not retroactive. *Konvalin* v. *Sigler,* (C.A. 8) No. 19731 (decided September 22, 1970, not yet reported). Therefore, in line with our controlling

court, we hold that *Coleman* does not apply retroactively to this situation.

Stidham's latest contentions are that he was denied the right to confront and cross-examine one Officer Eitzman who "testified before the jury and judge that he took statements implicating petitioner in the murder he was on trial for;" and that the testimony of Eitzman in regard to these implicating statements was objected to, the objection sustained, but the jury was not instructed to disregard it.

Stidham claims that he exhausted his state remedies in regard to these contentions because the Missouri Supreme Court decided them adversely to him on his direct appeal. *State* v. *Stidham,* 305 S.W. 2d 7. However, a review of that case shows that Stidham did not raise the issue that he was denied the right to confront and cross-examine Officer Eitzman in regard to alleged implicating statements. Nor was the issue raised in any of Stidham's appeals to the Missouri Supreme Court from denials of his 27.26 motions. See *State* v. *Stidham,* (Mo. Sup.) 403 S.W. 2d 616; 415 S.W. 2d 297; 449 S.W. 2d 634. Since Stidham does have presently-existing and adequate state remedies to raise this contention, the contention must be dismissed without prejudice. See 28 U.S.C. § 2254; *Fay* v. *Noia,* 372 U.S. 391.

In his direct appeal from his conviction, Stidham did allege that the trial court should have instructed the jury to disregard the testimony of Eitzman in regard to implicating statements, after sustaining an objection to it. The Missouri Supreme Court found the issue in favor of the state.

The objected-to testimony of Eitzman was as follows: "I had talked to him and explained to him that I had a statement—" (Tr. 508). The trial court sustained the ob-

jection to what Eitzman told Stidham; ruled that the witness was not to testify or be asked what statements he made, or what statements he had from other parties; and determined that the jury did not need to be instructed to disregard because nothing damaging had been said when the defense halted the testimony by its objection. (Tr. 508-511)

There does not appear to be a denial of a federally-protected right by the trial court's determination not to instruct the jury to disregard Eitzman's incomplete remark. Therefore, no relief can be granted by this Court.

For the foregoing reasons, it is

ORDERED that leave to proceed in forma pauperis be, and it is hereby, granted; and

ORDERED that the petition for habeas corpus be, and it hereby is, denied.

/s/ Wm R. Collinson
District Judge

APPENDIX K—Opinion of the Eighth Circuit Court of Appeals in Stidham v. Swenson, No. 20685

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,685

James William Stidham,
Appellant,

v.

Harold R. Swenson, Warden,
Appellee.

} Appeal from the Judgment of the United States District Court for the Western District of Missouri Denying Appellant's Petition for the Writ of Habeas Corpus.

[May 24, 1971.]

Before GIBSON, HEANEY and BRIGHT, Circuit Judges.

HEANEY, Circuit Judge.

On September 22, 1954, an inmate of the Missouri State Penitentiary was beaten and stabbed to death by fellow inmates during a riot in that institution. An investigation was undertaken by the prison authorities immediately after the quelling of the riot. Written confessions were eventually obtained from several inmates, including James William Stidham. Stidham's confession was used against him in his 1955 trial in state court in which he was convicted of first degree murder.

Stidham made a number of attempts to obtain relief in Missouri courts on the ground that the trial judge did not find his confession to be voluntary, as required by *Jackson* v. *Denno*, 378 U.S. 368 (1964),[1] before submitting it to the jury. *State* v. *Stidham*, 305 S.W.2d 7 (1957); *State* v. *Stidham*, 415 S.W.2d 297 (1967); *State* v. *Stidham*, 449 S.W.2d 634 (1970). He was unsuccessful in each attempt.

On November 9, 1970, a habeas corpus petition brought by Stidham was denied by the United States District Court for the Western District of Missouri. The District Court found (1) that the trial court which initially tried Stidham had complied with *Jackson*, and (2) that on the basis of the undisputed facts adduced at the state trial and the subsequent state evidentiary hearing, the confession was voluntary. Stidham appeals from the denial.[2]

COMPLIANCE WITH JACKSON

At the initial trial, the state court heard evidence outside the presence of the jury on the voluntariness of the confession. At the conclusion of the hearing, the trial court stated:

> "* * * [I]t is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant

1. *Jackson* v. *Denno*, 378 U.S. 368 (1964), is retroactively applicable. *Desist* v. *United States*, 394 U.S. 244 (1969); *Parker* v. *Sigler*, 413 F.2d 459 (8th Cir. 1969), *rev'd on other grounds*, 396 U.S. 482 (1970).

2. Stidham also contends on appeal that he was denied assistance of counsel at two critical stages of his trial, that he was tried and convicted on a charge not included in his indictment and that the State of Missouri knowingly used the perjured testimony of two convicts in obtaining his conviction. We affirm the decision of the District Court on each of these issues for the reasons given in that court's memorandum opinion. *Stidham* v. *Swenson*, Civ. No. 18121-2 (W.D. Mo. May 15, 1970).

has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted * * *

"MR. HENNELLY [Defendant's counsel]: In other words, the Court is overruling my Motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?
"THE COURT: That is right. * * *"

The United States District Court found that this ruling comported with the requirements of *Jackson* v. *Denno*, *supra*, stating:

> "It would be highly technical, in this day and age, to hold that the word 'voluntary' was a word of art and, in its absence, a conviction by a jury, after a long trial, should be set aside because the judge ruled the statement not involuntary instead of ruling that the statement was voluntary. It is the opinion of this Court that the statements and action of the judge does clearly indicate a finding of voluntariness, and is sufficient under the teachings of Jackson v. Denno, supra, and Sims v. Georgia, [385 U.S. 538 (19...)]."

We believe that the District Court's analysis is incorrect. It assumes that Missouri law, at the time of Stidham's trial, required the trial court to find that a confession was voluntary before permitting it to be considered by a jury. Our examination of the Missouri case law convinces us that a trial court had and frequently used the right to submit the question of voluntariness to the jury without a prior determination that the confession was voluntary.

The following statements of the Pre-*Jackson-Denno* Missouri procedure support this view:

> "* * * [W]hen there is substantial conflicting evidence and the question is close it is better to refer the underlying issue of voluntariness to the jury than to exclude the confession, since there is less chance of a miscarriage of justice by leaving the question open to a second determination, before the jury on a rehearing of the evidence under proper instructions, than by foreclosing the inquiry. The court then can still exclude the confession if it finds from all the evidence, including that introduced at the preliminary hearing, that the same was involuntary. * * *"

State v. *Gibilterra*, 116 S.W.2d 88, 94 (1938).

> "It is my view that we should adhere to the standard of admissibility of confessions of whether or not the particular confession is voluntary in fact. That has always been the rule of this Court. * * * [T]his is a jury question unless its involuntary character so conclusively appears that it must be held to be involuntary as a matter of law. * * * If the confession is voluntary in fact, and is true, the defendant's rights are not violated by putting it in evidence. Some one must determine these fact issues, and our system is to leave them to the jury, when they must be decided on conflicting evidence." (Citations omitted.)

State v. *Sanford*, 193 S.W.2d 37, 38 (1946) (concurring opinion).

> "* * * Under our system of jurisprudence it is generally left to the jury to determine whether a confession was voluntary, unless the contrary appears so conclusively that the confession must be held involuntary as a matter of law. * * *" (Citations omitted.)

State v. *Laster*, 293 S.W.2d 300, 304 (1956).[3]

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3. See also, *State* v. *Bridges*, 349 S.W.2d 214 (1961); *State* v. *Barnett*, 338 S.W.2d 853 (1960); *State* v. *Falbo*, 333 S.W.2d 279 (1960); *State* v. *Statler*, 331 S.W.2d 526 (1960); *State* v. *Phillips*, 324 S.W.2d 693 (1959); *State* v. *Bradford*, 262 S.W.2d 584 (1953); *State* v. *Cochran*, 203 S.W.2d 707 (1947); *State* v. *Ellis*, 193 S.W.2d 37 (1946).

Our analysis of the record of Stidham's trial leads us to conclude that the trial judge in this case submitted the voluntariness issue to the jury without making a prior factual determination that the confession was voluntary. His finding, that the confession was not "involuntary as a matter of law", was not, under the then existing Missouri law, the same as finding that it was voluntary. If the trial judge does not make a *factual* determination that a confession is voluntary before submitting it to the jury, *Jackson* standards are violated. *Parker* v. *Sigler*, 413 F.2d 459 (1969), *rev'd on other grounds*, 396 U.S. 482 (1970).

The Missouri Supreme Court's treatment of this issue on Stidham's appeals buttresses our view that the requirements of *Jackson* were not met. In its first *Stidham* opinion, 305 S.W.2d 7 (1957), the court stated:

> "There is no merit in defendant's contention that his written confession was coerced and involuntary and was admitted in evidence before the State established that it had been voluntarily given. The court conducted a full preliminary hearing on the issue, *found the issue was for the jury, and later, after hearing the evidence before the jury submitted the issue to the jury for determination.* * * * On the conflicting showing the issue of the voluntariness of the confession was for the jury. * * *" (Emphasis added.)

In its most recent *Stidham* opinion, 449 S.W.2d 634 (1970), the Missouri Supreme Court examined its procedure and determined that "* * * Missouri employs the so-called Massachusetts procedure 'impliedly approved in *Jackson* v. *Denno*' * * *". In doing so, the court relied upon *State* v. *Washington*, 399 S.W.2d 109 (1966). We point out that *State* v. *Washington* was decided after *Jackson* became the law, and a comparison of its standard with those enunciated in the Missouri cases, above cited, reveals the difference between the 1955 and 1966 standards.

THE VOLUNTARINESS OF THE CONFESSION

The Supreme Court recently reemphasized that a defective procedure, standing alone, is not a sufficient basis for habeas corpus relief:

> "[Our decisions][4] did not establish that an applicant for federal habeas corpus is entitled to a new hearing on the voluntariness issue, in either the federal or state courts, merely because he can point to shortcomings in the procedures used to decide the issue of voluntariness in the state courts. Our decisions make clear that he must also show that his version of events, if true, would require the conclusion that his confession was involuntary."

Procunier v. *Atchley*, . . . U.S. . . ., 27 L.Ed.2d 524, 529 (1971).

Stidham alleges: that he was returned to his regular Death Row cell in the early evening of September 22; that between September 22 and September 27, he was questioned intermittently by police officers and state troopers who threatened him with physical harm if he did not tell everything he knew about the murder; that between September 22 and September 27, he was able only to catch short naps while sitting on the toilet because his straw tick, on the floor, was too water-logged to be slept on as a result of his cell being flooded when rioting inmates opened water pipes; that he was given nothing to eat from September 22 until September 29; that he weighed 184 pounds before the riot but only 159 pounds on September 29; that he was never informed of his *Miranda* rights;[5] that on September 27, he was taken to the prison's

4. The Court was specifically referring to *Jackson* v. *Denno*, *supra*, and *Townsend* v. *Sain*, 372 U.S. 293 (1963).

5. Since the *Miranda* decision is not retroactive, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), this allegation, even if true, is not dispositive of the case. However, failure to warn of constitutional rights is a factor properly considered in determining the voluntariness issue. *Clewis* v. *Texas*, 386 U.S. 707 (1967); *Davis* v. *North Carolina*, 384 U.S. 737 (1966).

athletic field house and questioned in the presence of six police officers armed with pistols, rifles and riot guns; that he was questioned for approximately twenty to thirty minutes, during which time he denied involvement in the murder; that, thereafter, a rope was placed through his handcuffs and he was hung up for approximately fifteen minutes with his hands behind him; that upon his continued refusal to implicate himself, he was again hung up and beaten with corkball or baseball bats until he lost consciousness; and that he then wrote out a confession which was dictated to him.

We believe that the above version of the facts, if true, requires the conclusion that the confession was an involuntary one. See, *Brooks* v. *Florida*, 389 U.S. 413 (1967); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Brown* v. *Mississippi*, 297 U.S. 278 (1936).

We emphasize that we do not decide or intimate that the allegations are true. It is not the task of the federal court to do so in state habeas corpus matters:

> "* * * [T]he appropriate remedy when a federal court finds a Jackson v. Denno error in a prior state proceeding is to allow the State a reasonable time to make an error-free determination on the voluntariness of the confession at issue. * * *"

Sigler v. *Parker*, *supra* at 484.

We only note, as did the United States District Court, that we have examined the transcripts and other relevant materials and have found that several of Stidham's allegations have not been contradicted in the record.

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings consistent with the remedy provided for in *Sigler* v. *Parker*, *supra*.

GIBSON, Circuit Judge, dissenting.

I respectfully dissent. Appellant Stidham has been accorded many hearings and with the aid of extremely able and expert counsel has raised just about every objection and defense available in the well stocked arsenal of defense tactics—this he has a right to do, but I do not think the never-ending search for error, fancied or otherwise, serves the cause of criminal justice. The Courts rather than spending limited judicial resources in open end legal proceedings should give heed to the many evils engendered in the law's delay and give adherence to the constitutional mandate for speedy trials. Only by unclogging the dockets can this be done. Much has been said and written about the inordinate delays, both at the trial and appellate levels, that have burdened and made ineffective to a large extent our system of criminal justice.

I would affirm on the basis that the Missouri Supreme Court has correctly enunciated the Missouri law applied in this case at the original trial and that Court's holding that the procedure in this case was compatible with *Jackson* v. *Denno*. *State* v. *Stidham*, 449 S.W.2d 634 (Mo. 1970). A State Supreme Court is the best interpreter of its own laws. In addition, a review of the entire record of the original conviction, the record in the plenary hearing in the state post-conviction review, together with the federal post-conviction review in the federal District Court does not affirmatively demonstrate any ground for upsetting the jury verdict of 1954.

First as to the law, the preliminary inquiry into the voluntariness of the confession during the original trial of this case held by the trial judge out of the presence of the jury, I think, adequately satisfied the requirements of *Jackson* v. *Denno*, 378 U.S. 368 (1963). The failure of the trial judge to use the word "voluntary" instead of "not

involuntary" is a matter of semantics and too technical a basis upon which to upset a conviction affirmed by the highest state court. The jury is the ultimate trier of fact on the voluntariness issue if the confession is not involuntary as a matter of law. *Jackson* v. *Denno*, required a preliminary examination outside of the hearing of the jury on the issue of voluntariness. This was done.

The trial judge at the plenary preliminary hearing could only do one of two things; hold the confession involuntary as a matter of law and thus not admit it, or view it as not involuntary as a matter of law and admit it in evidence together with any evidence on the voluntariness issue that the accused wished to present. After all, the jury is the sole and only arbiter of the facts and only has to give the confession such weight as it deems merited. The trial judge could not say the confession is voluntary and instruct the jury that it must accept the confession and act accordingly.[1] The judge here made the only finding he could legally make to have the confession admitted into evidence for the jury's consideration; that is, it was admissible on the ground that it was not involuntary as a matter of law. This was a far cry from the limited and incomplete procedure condemned in *Jackson* v. *Denno*.

The argument here appears to be more a matter of semantics or technicalities than a substantial procedural defect in trial proceedings. The trial court's decision in admitting the confession was based on conflicting evidence, the same evidence that is now urged to upset the verdict and judgment of the state court. No new evidence has been adduced and we are in effect now being asked to

1. The trial judge could not tell the jury the confession was voluntary; that would constitute error in a Missouri state trial, be considered a fatal comment on the evidence and as invading the province of the jury.

review this same evidence and hold the procedure bad because the judge did not use the magic rubric "voluntary" but said in effect, as is clearly shown by the record, that the confession was admissible and not involuntary as a matter of law.[2] By refusing to hold that the confession and statements were involuntary, the Court in the context of this hearing would be holding that the confession and statements were voluntary. This particular preliminary hearing on the confession and statements was not held just to see if there was conflicting evidence, as under the New York rule held defective in *Jackson* v. *Denno*.

Second as to the facts, I agree with the majority that *Procunier* v. *Atchley*, . . . U.S. . . ., 27 L.Ed.2d 524 (.....), is not applicable to this case as the appellant would clearly be entitled to have the confession ruled inadmissible if his version of the facts is correct and, in addition, his conviction would be a travesty on justice if his version of the facts in the case is correct. The conflict of the evidence in this case carries throughout the confession and the other evidence adduced at the trial. The decision on the admissibility of the confession is solely predicated on credibility factors. The only evidence of a forced or involuntary confession comes from the mouth of the accused. All of the other evidence, including that of

2. At the conclusion of the preliminary hearing on the issue of the admissibility of the confession (and it would not be admissible if involuntary), the trial judge said,

> "It is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, * * * The defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence * * * that the statement is and should be admissible in evidence, subject to further examinations of the witnesses * * *."

And in response to appellant's counsel's question of whether he was overruling the motion and request "to hold as a matter of law that those statements were involuntary", replied "That is right."

four St. Louis, Missouri, policemen and two State Highway Patrolmen are in direct conflict with the testimony of the accused in regard to the confession. Further, testimony of the accused regarding his non-participation in the killing of Donnell is rather persuasively refuted by prison guard Dietzel and inmates Creighton and Trout, all of whose statements are consistent with the State's version of the group assault and killing of inmate Donnell.

In other words for Stidham to be innocent as claimed all of the other testimony in the case, except as to formal matters and some neutral medical testimony from the Springfield Medical Center, would have to be out and out perjury. As noted by the Missouri Supreme Court in Stidham's original appeal, *State* v. *Stidham*, 365 S.W.2d 7 (1957), the accused Stidham while taking the stand failed to controvert essential elements of the State's case and failed to adduce any corroboration for his version of the facts.[3]

The trial lasted several days and the jury after being out 1½ hours rendered a unanimous verdict of guilty. Certainly no material error affecting the integrity of the fact-finding process has been disclosed.

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3. A reading of the record of the original trial shows the rioters made a particular effort to break through three doors to get into Death Row where Stidham was being held in solitary confinement (for infraction of prison rules—escape) for the particular purpose of releasing Stidham and then presenting him to the group as their leader. Stidham's version that he left the Death Row area immediately and went upstairs to another cell and listened on the radio while drinking coffee during all of the period of the tumultuous riot does not appear credible. Also no corroboration has been produced by Stidham either at the time of trial or since. While on the other hand three witnesses, guard Dietzel and inmates Creighton and Trout, directly controverted Stidham's version of his actions at that time and place Stidham at the scene of the crime with the other six defendants who were accused of this brutal and sadistic killing. Without detailing all of the evidence, the evidence presented aside from the confession was persuasive.

I would affirm Judge Collinson and his view that the action of the original trial judge "clearly indicates a finding of voluntariness and is sufficient under the teachings of *Jackson* v. *Denno, supra,* and *Sims* v. *Georgia, supra.*" Furthermore issues of credibility and issues of fact decided long ago should not be upset by technicalities or semantics. There appears to be no constitutional defect in the fact-finding process utilized in this case and the issue of credibility after full hearing was decided adversely to Stidham both in the original trial and at a plenary State post-conviction hearing, *affirmed* in 449 S.W.2d 684 (Mo. 1970). I would affirm the District Court's denial of relief.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX L—Order Denying Petition for Rehearing En Banc Before the United States Court of Appeals for the Eighth Circuit in Stidham v. Swenson, No. 20685

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1970

James William Stidham, Appellant,
vs.
Harold R. Swenson, Appellee.
No. 20685

Appeal from the United States District Court for the Western District of Missouri.

This appeal comes before the Court on consideration of appellee's petition for rehearing or transfer to the Court en banc. Being fully advised in the premises, it is now here ordered:

1. Petition for rehearing en banc is denied by an equally divided Court;

2. Petition for rehearing by the panel to which the case was previously submitted is denied.

June 11, 1971

Supreme Court of the United States

No. 71-224 ---, *October Term, 19*

Harold R. Swenson, Warden,

Petitioner,

v.

James William Stidham

ORDER ALLOWING CERTIORARI. Filed January 24 ---------- , 19 72.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth ----------. Circuit is granted.